The Contingent Ethics of Market Transactions: Linking the Regulation of Business to Specific Forms of Markets  
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THE CONTINGENT ETHICS OF MARKET TRANSACTIONS: LINKING THE REGULATION OF BUSINESS TO SPECIFIC FORMS OF MARKETS

M. Neil Browne*
Facundo Bouzat**

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Court decisions and legislative debates are replete with references to the alleged benefits of market exchanges. However, the unexamined assumption, lurking in these allusions to the benign implications of market decisions, is that the markets we are referencing are particular types or structures of markets. Change the structure of markets, and the inferences drawn from

* Distinguished Professor of Economics, Bowling Green State University.
** Honors Scholars Research Associate, Bowling Green State University.

the deification of market results become more or less illogical and legally confused. In other words, the ethical implications of market decisions rest firmly on the specific attributes of the pricing arrangements in a specific industrial context. Therefore, the desirability of regulation in a particular production or distribution decision is context dependent on the form of the market in question.

As gas prices soar, the community wonders afresh: can we depend on market forces to yield a fair price, or do we need greater legal regulation of this market? Law and economic voices tend to champion the idea of cultural norms as a protector against unethical behavior in markets. When do private interactions among parties to a market exchange serve as a stimulus to ethical conduct, and when must these private interactions be nudged so as to provide ethical business activities?  

2. Richard A. Epstein, Lawyers’ Rise or Fall?, 26 NAT’L L.J. (May 31, 2004), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005408689 (subscription required). Epstein argues that “[m]ost routine disputes about the practice of law don’t call for legal intervention precisely because the wide range of low-level social sanctions works remarkably well to keep people in line.” Id. In other words, legal intervention on behalf of consumers in markets is a costly waste of time inconsistent with the value of efficiency. However, even Professor Epstein, a persistent critic of the legal regulation of business, recognizes that norms are only useful in particular contexts. In the spirit of this Article, he realizes that a market is not a market is not a market, but that each market operates in a context of more or less openness and accessibility to consumer needs.

The success of these sanctions, however, varies inversely with the size of the target group. In small communities and businesses, individuals are constantly under the watchful eye of family and friends; any small deviation from some deeply held social norm is likely to prompt a pointed response.

Id.; cf. Alex Geisinger, Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation, 57 ALA. L. REV. 1, 1–2 (2005) (arguing that social norms do not provide the promised ethical protection to the general public because of various habitual cognitive errors that distort social judgment about organizational behavior).

3. See generally Richard H. Thaler & Cass R. Sunstein, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (Penguin Books 2009) (2008) (discussing “libertarian paternalism”). The core of their argument is that people should be encouraged to exercise autonomy after the community has adjusted the market environment such that the decision-makers will have
Greed is a tool with great social potential. Its use in markets can encourage efficiency, consumer sovereignty, and honesty. But depending on the nature of the markets where greed is put to work as a motivator, it can also be a device by which some stakeholders enrich themselves at the expense of others, and in the process create distortions in the social fabric that markets claim to strengthen.\footnote{On June 2, 2008, the Washington Post sponsored a panel discussion on the role of greed in modern market economies. See Susan Jacoby, \textit{Greed is not Good—So What Do We Do About It?}, \textit{Washington Post: On Faith} (June 2, 2008, 9:00 AM), http://newsweek.washingtonpost.com/onfaith/panelists/susan_jacoby/2008/06/greedy.html. Jacoby attacks greed as a market motivational tool since market institutions as essentially unregulated. \textit{Id}. But her analysis does hint at the recognition that greed can be harnessed for ethical advancement because her critique is of greed at work in a marketplace, which according to her, has no restrictions. \textit{See id}. Her contribution reflects an extreme perspective that is the direct opposite of the extreme confidence in markets reflected in the assumptions of far too many legal scholars. \textit{See also Adin Steinsaltz, \textit{Greed is Unjustified Desire}, \textit{Washington Post: On Faith} (June 2, 2008, 7:57 AM), http://newsweek.washingtonpost.com/onfaith/panelists/adin_steinsaltz/2008/06/if_greed_is_indeed_a_dealy_sin.html.} Steinsaltz expresses doubt that greed has any positive social effects. \textit{Id}. His argument is designed in part to rehabilitate the potential for greed as an instrumental device for achieving certain ethical ends; \textit{viz.}, efficiency, economic freedom, and personal responsibility, \textit{but only when markets are constructed in such a fashion that consumers and the vulnerable have a fair and honest opportunity to have their interests represented in market calculations}. \textit{See id}. \textit{See also Nicholas T. Wright, \textit{Satisfying Our Needs, Gratifying Our Wants}, \textit{Washington Post: On Faith} (June 2, 2008, 7:22 AM), http://newsweek.washingtonpost.com/onfaith/panelists/nicholas_t_wright/2008/06/satisfying_our_needs_gratifying.html (recognizing the potential of regulated greed as an incentive, but still beginning his contribution to the panel with the statement: “Greed is by definition always wrong”).} The purpose of this Article is to focus attention on the differential ethical effects of different kinds of markets. In other words, from an ethical perspective, one market does not have the same inviting possibilities for human development that another market might possess.\footnote{See Sandra K. Miller, \textit{Fiduciary Duties in the LLC: Mandatory Core Duties to Protect the Interests of Others Beyond the Contracting Parties}, 46 Am. Bus. L.J. 243 (2009), for a concurrence with the need for deeper analysis of the market. Miller challenges “the view of the limited liability company (LLC) as a singularly private contract.” \textit{Id}. at 243. Instead, Miller suggests that the “LLC
can be achieved through the activities of each and every market. Symmetrically, there is no ethical condemnation that applies equally to all markets. The specifics of a market context are ethically determinative in the same manner that a legal fact pattern is determinative of the resolution of the case.

The flow of this Article will consist of a critical assessment of the failure of many judges and legal scholars who seem to believe that one market has identical ethical implications as any other market. The objective of the critique is to encourage legal analyses of market exchanges to be sensitive to power relationships, quality of product information, and the type of commodity being exchanged. Without such sensitivity, “the should be regarded as a social entity that operates with a purpose to make profits for members under a privilege to do business within public policy constraints.” Id. Her critique comes from acknowledging the market conditions in which business contracts preside:

The contractarian theory presupposes a level contractual playing field and perfect market conditions free of repeat-player advantages; information asymmetries; and inequalities in education, sophistication, and legal representation. Such perfect conditions exist only in the abstract and empirical data suggest that there may be substantial inequalities in the real world. Id. at 278. Miller's reasoning reflects the careful consideration of the conditions of the market argumentatively necessary when weighing the social consequences of contractual versus mandatory duties, or more generally, when inquiring of the ethical ends concocted by certain market conditions. See id. Without questioning the conditions of the market, (and assuming that the market is the utopian competitive market) the costs bestowed on “less affluent” firms from contractarian policies would have been overlooked as an individual problem versus a structural one and the ethical implications of a competitive system could have been falsely adhered to. See id.; see also Rob Atkinson, Connecting Business Ethics and Legal Ethics for the Common Good: Come, Let Us Reason Together, 29 J. CORP. L. 469, 488 (2004) (“If, for example, a poor person cannot afford legal assistance in asserting a contractual right, then he or she may well lose his or her entitlement to the very value of his or her labor to someone already wealthier.”). Such contractarian policies imply that although some scholars may see contracts as supplements to the efficiency of the market, i.e. rewarding the hard working firms and leaving the allocation of goods to market forces, contractarian policies may actually produce a market environment vulnerable to discrimination between rich and poor firms. See Miller, supra, at 256. These deliberations exemplify one thread within the business community of the importance of analyzing the conditions of the markets, and add to this Article's general plea for sensitivity to the fact that specific market conditions have specific ethical implications.
market,” too easily becomes a device by which the sophisticated and the strong use other people for their personal advancement. The resulting mistrust of market behavior and institutions undercuts the potential strength of markets to serve our ethical interests.

I. INTRODUCTION

“We lie all the time, but if everyone knows that we’re lying, is a lie really a lie?”

Robert Jackall, Moral Mazes

Monopolies are in principle odious, and when they are necessary they must be under public control; whether the control shall be central or local, direct as in the post-office, or indirect by way of regulated franchises, is a matter of means and economic expediency (thus electric supply now seems capable of centralization on a great scale and with advantage, and our numerous railway companies are now amalgamated in a few groups). Our lady the Common Law is a very wise old lady though she still has something to learn in telling what she knows.7

Sir Frederick Pollock

When businesspeople behave in ways that appear morally objectionable, we wonder why. If we can decipher, in even some small way, the rationale for these behaviors, we are on the way to ethical enrichment. While many ethical dilemmas arise when exchange occurs in a market setting, none is perhaps as oft-deplored as the tradeoff between honesty and personal security.8

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6. See Robert Jackall, Moral Mazes: The World of Corporate Managers 121 (1988) (internal quotation marks omitted), for a particularly revealing and depressing look at the ethics of modern managers. The top executives interviewed by Jackall tended to see ethics as largely a defensive maneuver used to preserve and enhance their careers. See, e.g., id. at 121.


8. See Robert H. Frank & Ben S. Bernanke, Principles of Microeconomics 271–77 (4th ed. 2009), which summarizes the prisoner’s
Such dilemmas are inescapable on a regular basis; no amount of equivocation concerning the boundaries of honesty can forestall them.

The American context for these dilemmas is one where habits and understandings have a strongly individualistic foundation.\(^9\)

Dilemma and uses it to analyze the ethical trade-offs that often arise in market settings; for example, that of honesty or self-gain. Id. The basis for such dilemmas can be seen by distinguishing dominant strategies from dominated strategies. The former strategy entails that market players pursue actions that yield higher payoffs regardless of what the other player chooses. The latter strategy involves pursing an action that usually leads to a lower pay-off. The problem is that oftentimes to maintain an honest, decentralized marketplace, firms regularly need to pursue dominated strategies; thus, potentially minimizing profit. Transferring game theory to the market sphere reveals that the structure of the market essentially relies on the behavior of market players. The problem is that one cannot simply assume that a certain type of behavior is present in the marketplace when the trade-offs involved have almost equal significance from the point of view of the players. Rather, an ethos of uncertainty underlies the behavior of players in the prisoner’s dilemma: they are forced to choose between blindly trusting the other players or pursuing the safest actions available to them to minimize their costs. Id. Frank and Bernanke appropriately suggest: “[T]he common thread [behind the prisoner’s dilemma] is one of conflict between the narrow self-interest of individuals and the broader interests of larger communities.” Id.

9. See Sharon Begley, West Brain, East Brain: What a Difference Culture Makes, NEWSWEEK (Feb. 17, 2010, 7:00 PM), http://www.thedailybeast.com/newsweek/2010/02/17/west-brain-east-brain.html. In this article, Begley highlights the important role that American culture plays in the moral development of this country’s citizens.

[S]ome of the [cultural neuroscientific] findings, as with the “me/mom” circuit, buttress longstanding notions of cultural differences. For instance, it is a cultural cliché that Westerners focus on individual objects while East Asians pay attention to context and background (another manifestation of the individualism–collectivism split). Sure enough, when shown complex, busy scenes, Asian-Americans and non-Asian-Americans recruited different brain regions.

Id.

See also Jonathan B. Freeman et al., Culture Shapes a Mesolimbic Response to Signals of Dominance and Subordination That Associates With Behavior, 47 NEUROIMAGE 353 (2009), for a recent study that revealed results similar to those expressed by Begley. The authors performed an experiment in which they showed pictures of people in submissive positions and dominant positions to Japanese and American subjects, and then studied each subject’s brain activity. Id. at 354. The authors found that the brain’s dopamine-fueled reward circuit became most active when human subjects saw stances that reflected their cultural values the most; Americans being more responsive to the
Moral agents are seen primarily as choosers, opting for a particular moral identity. But one never chooses in a vacuum. Urging a consumer to choose in a marketplace (1) where sellers are encouraged to follow the dictates of their greed as a socially useful device, (2) when information about the commodity in question is truthful and abundant, and (3) where the social conditions of the buyer are comfortable enough such that he is not pushed into unfair bargains by his unfortunate circumstances has quite different implications from consumer choice in markets where those conditions are not present.

The development of business law depends on many aspirations and interests; we articulate those assumptions and dominant position, Japanese to the submissive position. Id. at 353–54.

A plethora of studies exist revealing the link between western culture and individualistic value preferences. For example, see Roy J. Lewicki & Robert J. Robinson, Ethical and Unethical Bargaining Tactics: An Empirical Study, 17 J. BUS. ETHICS 665 (1998), which revealed that U.S. MBA students were generally more accepting of competitive and hostile negotiating conditions than were non-U.S. business students. The implications derived therefrom were that American individualism impacted U.S. students’ ethical approach to business negotiations. Id. at 676. See Catherine H. Tinsley & Madan M. Pillutla, Negotiating in the United States and Hong Kong, 29 J. INT’L BUS. STUD. 711 (1998), for a study that found similar individualistic traits in American negotiations compared to the more collective-oriented Hong Kong negotiators.

See Steven J. Heine et al., Beyond Self-Presentation: Evidence for Self-Criticism Among Japanese, 26 PERSONALITY & SOC. PSYCHOL. BULL. 71 (2000), whose study revealed that Canadian students were more reluctant to accept that they had performed below the average of the class than were Japanese students, who were actually reluctant to conclude that they had performed above average in comparison to the class. The self-criticism of the Japanese students was linked to a more collective mindset versus the more individualistic Canadian mindset, which was more geared towards self-enhancement. Id.


behavior is shaped by structural incentives, so observed consequences must be evaluated in the context of the institutional milieu in which the empirical observation is made. Thus, in considering the consequences of increased competition in a particular market, one must be aware of the institutional constraints on how competition is channeled before drawing policy conclusions.

Id. The previous insight highlights the fact that our behavior is limited by the market conditions that we live in; we are forced to choose in a vacuum.
inclinations with the only tools at our disposal—words.\textsuperscript{11} If these words were transparent,\textsuperscript{12} possessing the meaning pinned to their respective concluding syllables, legal discourse would be more comprehensible, and hence, more likely to result in debate about the newly visible foundations for our arguments.\textsuperscript{13} Then, we would be able to see more fully just why it is that those who disagree with us seem to hold so firmly to those contrary views. Toward that end, this Article intends to clarify the meaning of a concept often bandied about in our court system and the legal studies of business, \textit{viz.}, “the market.” If the argument herein is at least moderately successful, we should all be more reflective listeners when we hear someone intone the glories or evils of this thing known as the market.

But where can we find legal scholars appealing to the market with little respect for its complexity? As the reader will see, the misuse of abstractions can be found everywhere. Though each abstraction contains multiple possible meanings and implications, the market is one of the few whose benevolent structure can be agreed upon, usually, that being something

\begin{itemize}
\item \textsuperscript{11} See \textsc{Neil Mercer}, \textsc{Words & Minds: How We Use Language to Think Together} (2000) (emphasizing the role of language as a mediator enabling us to be with others, rather than altogether apart). His emphasis on “interthinking” stresses the interpretive work we have to share when we make communicative attempts. See also \textsc{Robin Tolmach Lakoff}, \textsc{Talking Power} (1990) (presenting an especially effective explanation of the role of particular word patterns in establishing power relationships between the genders); \textsc{George Myerson}, \textsc{Rhetoric, Reason, and Society: Rationality as Dialogue} (1994) (introducing the liberating and constraining roles that language plays in our discourse).
\item \textsuperscript{12} See generally \textsc{John M. Conley} & \textsc{William M. O’Barr}, \textsc{Just Words: Law, Language, and Power} (1998) (arguing that the lack of transparency of language results in the largely hidden exercise and abuse of power in jurisprudential affairs); \textsc{James Boyd White}, \textsc{Law as Language: Reading Law and Reading Literature}, 60 Tex. L. Rev. 415 (1982) (analogizing between reading and legal interpretation by highlighting the required reflection about the multiple meanings of the words constituting the discourse).
\item \textsuperscript{13} See \textsc{Irving J. Lee}, \textsc{Language Habits in Human Affairs} (1941), for a robust discussion on the meaning and inherent ambiguity in words and concepts. The chapter entitled \textit{The Many Uses of a Word} is especially salient to the discussion on the clarity with which one uses key concepts or words. See \textit{id.} at 29–51. See generally \textsc{Irving J. Lee}, \textsc{The Language of Wisdom and Folly} (1949). See also \textsc{Susanne K. Langer}, \textsc{Language and Thought, in Exploring Language} 13 (Gary Goshgarian ed., 3d ed. 1983).
\end{itemize}
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similar to a competitive market. However, the law itself is not structured to disambiguate these abstractions so that they can be actualized in society;¹⁴ rather, this job is left to the judges and legal scholars who interpret the law.¹⁵ In the reasoning of legal authorities is where even basic economics training can make a

¹⁴ See 17 Am. Jur. 2d Consumer and Borrower Protection (2d ed. 2004), for a comprehensive statement of consumer protection laws: Truth in Lending Act, the Consumer Leasing Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, the Electronic Fund Transfer Act, the Real Estate Settlement Procedures Act, and the Home Mortgage Disclosure Act. See also 54 Am. Jur. 2d Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 1 to 708 (2009), for an outline of the anti-trust laws currently in place: Sherman and Wilson Acts, the Clayton Act, the Robinson-Patman Act, the Federal Trade Commission Act, the Bank Holding Company Act, the Public Utility Holding Company Act, the provisions of the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA), and the Interstate Land Sales Full Disclosure Act. The purpose of these consumer protection and anti-trust laws essentially is to maintain competitive market conditions. They provide that when certain kinds of behavior occur, it should be regulated. However, that behavior is more likely in some market forms than it is in others, so the statutes provide the legal framework that can be abused when there is not careful use of the concept of markets.

See also Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays (Walter Wheeler Cook ed., 2nd prtg. 1920). Hohfeld critiques the way legal scholars often conceptualize (or rather misconceptualize) the law.

[T]he tendency—and the fallacy—has been to treat the specific problem as if it were far less complex than it really is; and this commendable effort to treat as simple that which is really complex has, it is believed, furnished a serious obstacle to the clear understanding, the orderly statement, and the correct solution of legal problems. In short, it is submitted that the right kind of simplicity can result only from more searching and more discriminating analysis.

Id. at 26. The discriminating analysis that Hohfeld refers to is that of dissecting legal abstractions so that they can be practically applied to real-world problems. Such an analysis highlights this Article’s plea to be sensitive to the inherent ambiguity in the abstraction of the market.

¹⁵ See Nassim Nicholas Taleb, The Black Swan xxv (2007) for a discussion of the “platonic fold”: “[T]he explosive boundary where the Platonic mindset enters in contact with messy reality . . . .” The platonic fold is relevant to judges’ interpretations of the law because “the law” is abstract and very ambiguous. Thus, when judges make decisions as to whether the law applies in specific contexts, they are forced to make assumptions about humans in those contexts. The judges’ decisions, however, to compare their assumptions with reality determines whether they step into the platonic fold or stay out, assuming that they are right without carefully looking at the world around us.
difference in one’s ability to assess the implications of placing trust in the market. Specifically, this Article will look to the reasoning of judges and scholars because that is where the actualization of our ambiguous laws takes place and where the possibility of committing the reification fallacy arises.16

The necessary initial task of this Article is to establish that something called “the market” has special significance for the study of business ethics. If this Article is to address the need for greater appreciation of the ethical significance of that concept, it seems only fitting that there must be at least some demonstration that the market has some special salience in the scholarship constituting the legal study of business. If scholars sense a need to position themselves in terms of their loyalty to the idea, it follows that the quality of their consequent scholarship will depend, at least in part, on their fluency with the market and its various specific characteristics.17


17. See Alfred Korzybski, The Role of Language in the Perceptual Processes, in PERCEPTION: AN APPROACH TO PERSONALITY 170-205 (Robert R. Blake et al., eds., 1951). Korzybski argues that the ways in which we are “conscious of abstracting” can become problematic when we evaluate an idea or concept, and our abstracting therefore affects the way in which we “perceive” of the idea or concept. Id. at 190 (internal quotations omitted). Korzybski sets out to devise methods in which we can increase our “consciousness of abstracting,” which would “free us from the archaic limitation . . . inherent in our language structures.” Id.

One such method is the use and application of “extensional devices,” such as indexing. Id. Many of our words and ideas are ambiguous. The market, for example, is an economic concept with a variety of meanings and implications.

Thus, proper clarification of thought is required whenever one uses the concept of the market. The idea of indexing helps in such situations, Korzybski would argue, because it decreases the potential for ambiguity and allows for greater “abstracting.” Indexing (as in market₁, market₂, market₃ . . . marketₙ) produces an indefinite amount of “proper names” for “the endless array of unique individuals or situations with which we have to deal in life. Thus, we have changed a generic name into a proper name.” Id. Thus, market₁ could refer to a perfectly competitive market structure, while market₂ could refer to a monopolistic market structure, etc. Korzybski writes:

If this indexing becomes habitual, as an integral part of our evaluating processes, the psycho-logical effect is very marked. We
become aware that most of our ‘thinking’ in daily life as well as in
science is hypothetical in character, and the moment-to-moment
consciousness of this makes us cautious in our generalizations,
something which cannot be easily conveyed within [our current
system] of language.

Id. The use of indexing draws attention to the various structure or forms that
markets can take. The propensity with which concepts are used in an
ambiguous fashion would decrease were we to stop and think—which market?
Korzybski, however, warns that the simplicity of extensional devices, such as
indexing, can be misleading if they are not used with regularity and in daily
life. Id. at 193. “[A] mere intellectual understanding” of indexing will not serve
to eliminate the widespread ambiguity that currently serves to mar our
concepts in a cloud of confusions and misunderstandings. Id.

Concurring with the need to avoid the reification fallacy, see ALBERT
WILLIAM LEVI, PHILOSOPHY AND THE MODERN WORLD, 499–500 (1959), for a
history book covering many of the most powerful ideas that have influenced the
modern mind. “The Fallacy of Misplaced Concreteness . . . results from
mistaking the abstract for the concrete.” ALFRED NORTH WHITEHEAD, PROCESS
AND REALITY 7 (1978). The danger of committing the fallacy occurs when reality
is not carefully analyzed and is instead accepted as what certain abstract
theories project reality to be. LEVI, supra at 499. The fallacy does not imply
that abstractions be done away with but demands for their careful use in any
and all sorts of philosophical inquiry. As Whitehead notes, “[i]t is here that
philosophy finds its niche as essential to the healthy progress of society. It is
the critic of abstractions.” ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN
WORLD 73 (1926). Such critical analysis highlights the goal of the present
Article, which is to persuade legal scholars to be more sensitive to the
ambiguous nature of the market and the many ethical implications that the
respective market may project. See id.

The idea of the fluidness of reality and the consequent difficulty to
define reality can be traced back to ancient philosophy. See INTRODUCTORY
READINGS IN ANCIENT GREEK AND ROMAN PHILOSOPHY (C.D.C. Reeve & Patrick
Lee Miller eds., 2006) for, among many ancient philosophers, an overview on
Heraclitus. Heraclitus believed that reality essentially was in a constant state
of flux, therein, begging for clarification if one is to inquire about reality: “Upon
those who step into the same rivers, different and again different water flows.”
Id. at 11. The previous has been interpreted as a warning to not mistake the
map for the terrain. See PLATO, CRATYLS 95 (Benjamin Jowett trans., 2008)
(360 B.C.), for deliberation similar to Heraclitus’ ideas: “[E]verything is in a
state of transition and there is nothing abiding.”

For another historical view on the ambiguity of reality see THE
STANFORD ENCYCLOPEDIA OF PHILOSOPHY (3d ed. 2011), available at
http://plato.stanford.edu/entries/sorites-paradox: The Sorites paradox, or
paradox of the heap, exemplifies the inherent vagueness that certain words
possess. In short, the paradox demonstrates the inability to define exactly how
many grains of wheat constitute a “heap.” Certain words by their nature are
ambiguous and an effort to form a definition and understanding of those words
is essential for an argument to be logically developed and understood. In the
II. LEGAL SCHOLARS AND SOMETHING CALLED "THE MARKET"

The word “market” is saturated with ambiguity. In addition, the law by itself does not provide the necessary logical link that connects abstractions to their application in different societal contexts. Thus, scholars, businesspersons, lay people, judges, and lawyers consistently use the term market with negligence to its complexity. More pointedly, the market is assumed to be

spirit of this Article, the question—what is the defining point of a heap? would correspond to the question—what is the market? Taking the market for granted as some perfect entity demonstrates little fluency with the market and its various characteristics and the complexity of words in general.

For a more modern look at the plasticity of words see Taleb, supra note 15. Taleb refers to platonicity as “our tendency to mistake the map for the territory, to focus on pure and well-defined 'forms' . . . like utopias . . . .” Id. at xxv. This misconception of reality is what causes us to adhere to faulty assumptions. This tendency can be seen frequently in courts’ reasoning when they assume the market to be an optimal market. Further, these misconceptions of the market cause courts to appeal to an ethic that is not in reality most fit for the market environment at hand. By pointing out our faulty conceptions of reality, Taleb aims to improve our ability to talk about abstractions: “When these [platonic] ideas and crisp constructs inhabit our minds, we privilege them over other less elegant objects, those with messier and less tractable structures.” Id.


19. See John Cassidy, How Markets Fail (2009), for a distinction between utopian economics and reality-based economics. Utopian economics involves taking and applying Adam Smith’s theory of the market to the real world. Id. at 33. However, Cassidy points out that certain market imperfections, like externalities, irrationality and asymmetrical information, obstruct economic theory from being realized. Id. at 337–39. Reality-based economics, on the other hand, involves the analysis of the many different contextual situations upon which specific markets rest. Id. at 338. Thus, it requires going below the surface to evaluate the foundational assumptions of which generalized economic theory relies on.

In terms of ethics, Cassidy’s message is essentially that critics’ moral outrage should not be directed so much at the firms taking advantage of opportunities for profit afforded by the market, but rather at regulators and the economics profession advocating policies that are increasingly divorced from economic reality. Id. at 337; see also R. H. Coase, The Institutional Structure of Production, 82 AM. ECON. REV. 713, 714 (1992) (critiquing economists about assuming ideal market conditions: “What is studied is a system which lives in the minds of economists but not on earth. I have called the result ‘blackboard economics.’ The firm and the market appear by name but they lack any substance.”). The present Article takes Cassidy and Coase’s insight and aims at
benign and a social instrument for a good society.\textsuperscript{20} Few are rarely as explicit about this assumption as was Judge Kennedy (now Justice Kennedy) when speaking in almost sacred tones about the free market in the important Ninth Circuit decision \textit{American Federation of State, County, and Municipal Employees v. Washington (AFSCME)}.\textsuperscript{21} However, a significant number of those persons who produce and disseminate legal scholarship are only slightly less reverential.\textsuperscript{22} They too often fall victim to the clarifying the ambiguity of the market, so that in the legal arena, regulatory decisions reflect practical applications to specific market systems.


\textsuperscript{21} 770 F.2d 1401, 1407 (9th Cir. 1985).

\textsuperscript{22} The point of this Article is not to rebuke this reverence, but rather to argue that the claim is contestable. Hence, when a scholar or judge touts the market, they should, by all means, do so but only after examination of the specifics of the market in question. The following examples show instances where legal scholars and judges neglect to consider the structures of the markets they reference.

See Mark S. Fowler & Daniel L. Brenner, \textit{A Marketplace Approach to Broadcast Regulation}, 60 Tex. L. Rev. 207, 221–26 (1982) (arguing that the communications market suffers from the Federal Communications Commission’s regulation; thus, this market should be left alone). The authors posit: “[T]he Commission should rely on the broadcasters’ ability to determine the wants of their audiences through the normal mechanisms of the marketplace. The public’s interest, then, defines the public interest.” \textit{Id.} at 210. The argument is essentially a consumer sovereignty argument; it is used to undermine the FCC’s distribution of radio frequencies to broadcasters by appealing to consumers’ desires. However, the authors simply assume that by adhering to the market mechanism, consumer sovereignty will be found. Such an assumption overlooks the underlying assumptions which shape markets and, subsequently, determine if they will abide by consumer sovereignty. The authors, however, continue: “A marketplace approach to exclusive use of radio frequencies would open all positions in the electromagnetic spectrum to bidding by those who want them.” \textit{Id.} at 211. Thus, for a broadcaster to participate in the market, they would have to purchase a license. However, would all broadcasters have the equal ability to buy such licenses? To adhere to the competitive market requires one to first consider whether all firms have the respective income with which to participate in the market, and, of equal significance, whether firms are free to enter and leave the market. If these conditions were consistent with the communications market, then one might be able to move closer to trusting the market to efficiently allocate radio frequencies. However, if the present communication market does not mimic the
ideal conditions previously considered, then granting licenses would simply allow some firms to get richer at the expense of others.

The authors’ faulty reification of the market can be seen yet again when they attempt to apply the market mechanism to the broadcasting market:

Advertisers sponsor programs that they expect to appeal to the viewers they want to reach with their messages. In a sense, the advertiser acts as the representative for consumers, sometimes for all consumers, sometimes for demographic subgroups . . . Although the advertiser, rather than the consumer, pays for the program, market forces still move the key resource—time on an exclusive broadcasting frequency—toward its highest and best use.

Id. at 232–33.

The assumption in the previous statement is that consumer sovereignty will be maintained by advertisers investing only into those frequencies which consumers show the most interest in. However, such an assumption relies most heavily on the intermediary (i.e., the advertisers) to be able to present listeners with adequate information about what possible shows/programs are available. If, however, intermediaries were deficient in their supplying of information, then the market mechanism would fail to truly acknowledge the interests of consumers. Thus, the authors stop one step short in arguing on behalf of the market mechanism; they forget to analyze whether advertisers would truly be reliable to be informative intermediaries.

The authors conclude: “The Commission . . . should rely on market forces rather than its judgments on program service or other licensee decisions to determine where the public interest lies in broadcasting.” Id. at 233. Obviously, the authors are referring to optimal market forces; usually something close to the competitive market. However, the authors forget to question whether those ideal market forces are consistent with reality.

See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136 (1961) (quoting Standard Oil Co. v. United States, 221 U.S. 1, 57 (1911)). In this case, the Supreme Court reversed the lower courts’ findings that a railroad association had violated the Sherman Antitrust Act (forbiding “monopolizations that are created, or attempted, by the acts of ‘individuals or combinations of individuals or corporations’”) by destroying the plaintiffs—a group of truck companies—ability to conduct business. Instead, the Court characterized the behavior of both parties as a “no-holds-barred fight.” Id. at 144 (internal quotation marks omitted).

The Court’s final decision is basically that the railroads did not monopolize the market, but the government’s policy did: “The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena.” Id. at 141. The railroads did no more than try to persuade the government into upholding a policy that would harm the truck companies. However, did the Court consider when “persuading” crosses the line between fair and malicious? The Court’s reasoning with respect to the way political representation works attempts to supply an answer:

[T]he whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold
that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

*Id.* at 137.

Though the Court is correct in its assertion that the function of the government is to actualize the desires of its citizens, the Court ignores the possibility of the economic marketplace having a significant effect on the political marketplace. For example, if the railroad company used unfair advertising tactics that deceived and tricked individuals into voting for certain regulations, then the Court’s logic would fail with respect to the alleged ability of the government to gain adequate insight of citizens’ opinions and wishes. Corporations could influence the people to agree with them and, consequentially, get what they want in the political marketplace. Thus, how free would people be to inform the government? The Court’s reasoning fundamentally relies on the optimistic assumption that individuals freely express their wants and needs. However, market conditions are never analyzed to see if individual opinions are not actually being influenced by the power of large corporations for the end of forming or strengthening their monopolization of the current market.

See *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), in which the Court concluded that the FCC had provided “rational” grounds for their argument that market forces should be left alone. The FCC posited that “the public interest is best served by promoting diversity in entertainment formats through market forces . . . .” *Id.* at 585. However, the FCC never analyzed the nature of those market forces. For market forces to function as touted, certain underlying assumptions have to be validated. Otherwise, market forces may just as likely be monopolistic or competitive. The Court accepted the FCC’s reasons for why market forces can be trusted to fairly allocate radio broadcast licenses:

> Allocation by market forces accommodates listeners’ desires for diversity within a given format and also produces a variety of formats . . . . [Also] the market is far more flexible than governmental regulation and responds more quickly to changing public tastes. Therefore . . . the market is the allocation mechanism of preference for entertainment formats . . . .

*Id.* at 590 (internal quotation marks omitted). The previous reasoning assumes a high degree of consumer sovereignty—in other words, a market that meets consumer desires and needs. However, the preconditions necessary for a market to abide by consumer sovereignty are never analyzed. For example, if market power was concentrated in a few broadcasting firms, then all other firms might not be able to freely enter or leave the prevailing market.

Consequentially, the alleged diversity of radio broadcast firms that helps meet the broad range of interests of consumers would cease to exist. Another unquestioned assumption is whether consumers have enough
information with which to form rational opinions about which radio broadcasting firms they prefer. For example, if a few radio broadcasters had significant control over broadcast licenses, those same broadcasters could twist information about other radio companies to heighten their own reputations. Consequentially, consumers could be influenced to demand more radio time from these powerful broadcasters—thus, further straying away from the competitive market that theoretically abides by consumer sovereignty. In all, the Court relies on ideal reifications of market forces without analyzing the foundational assumptions behind such assertions.

Surprisingly, the previous case parallels the reasoning in a case more than 40 years prior. Once again, the reification fallacy emerges in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). At one point, the Court proclaims: “Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.” *Id.* at 475. In the previous reasoning, the Court necessarily assumes competitive market conditions where consumer demand decides the fate of businesses. Thus, through recognition of consumer sovereignty, firms allegedly decide the future of their businesses by appealing to the desires of consumers. However, if market conditions were less than competitive, and other radio stations had excess market power, then those powerful stations could use their respective power to enrich themselves and influence consumers to demand more of their time versus the time of other less powerful stations. In other words, the market structure that abides by complete consumer sovereignty would crumble. Consequentially, the Court’s initial assertion would lose all of its legitimacy.

See also Pa. State Bd. of Pharmacy v. Pastor, 272 A.2d 487 (Pa. 1971). The Supreme Court of Pennsylvania reversed the lower court’s decision that found the advertising of the appellee, a pharmacist, unconstitutional. In short, the court ruled that the pharmacist’s advertising of prescription drug prices had no effect on consumer behavior, because those consumers were essentially following the orders that their physicians should have proscribed. The court stated further that “[l]ack of information on prices, occasioned in part by the instant prohibition, results in consumers having little idea as to the proper prices for prescription drugs, thus running a substantial chance of paying more for medicines than is necessary.” *Id.* at 494. The previous statement understands that different communal pharmacies pose different prices for the same medicines. However, the court assumes that by allowing such price advertising, consumers will be able to purchase from those firms that provide more affordable prices. Such an assertion, however, neglects to consider that firms might only advertise those products that are cheap and hide those medicines that are more expensive; the structure of the market pertaining to “perfect information” is ignored. For the purpose of maintaining perfect information for consumers, the court would have to ensure that pharmacies would advertise all prices of all drugs, even if doing so could lead to fewer purchases. Since, it is often the exact opposite that occurs in terms of seller’s behavior, the court’s assertion relies on market conditions that need to be verified.

See also Shaw v. Digital Equip. Corp., 82 F.3d 1194 (1st Cir. 1996). In
an opinion by Judge Lynch, the appellate court affirmed the prior court’s decision that a corporation had not provided plaintiff stockholders with fraudulent, optimistic statements that would constitute a securities fraud cause of action. Id. at 1218, 1225. In other words, the corporation in question had not failed to provide any pertinent material that could affect the plaintiff stockholder’s investment decisions. See id. The court alluded to the nature of stockholders to justify that the transactions in question were fair: “Reasonable investors understand that businesses fluctuate, and that past success is not a guarantee of more of the same.” Id. at 1210. However, does such an assumption adequately portray the nature of all stockholders? Such an assumption, for example, requires that stockholders be wary about the way corporations oftentimes exaggerate their successes and cover-up their losses. Thus, the court’s view relies heavily on the assumption of high consumer rationality. If all stockholders were highly educated about the way the economy works, then perhaps one could expect investors to make knowledgeable decisions. But, before such an optimistic notion of reality can be trusted, a consumer’s ability to make reasonable decisions should be analyzed. Otherwise, the court’s decision could be relying on false conceptions of reality and, consequentially, harming stockholders.

See also Cott Beverage Corp. v. Horst, 110 A.2d 405 (Pa. 1955). In this case, the Secretary of Agriculture and Attorney General appealed a prior decision that allowed a corporation to sell carbonated drinks containing sucaryl without any label describing the ingredient. Id. at 406. The appellate court affirmed the lower court’s decision on the basis that the corporation’s selling of the carbonated drinks did not require any regulations: “Under the guise of protecting the public interests the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations.” Id. at 407. Unfortunately, the court did not consider the contingent implications of private business in different types of markets. Depending on how informed consumers are about their purchases, government regulation might be needed to maintain a market type that meets consumers’ needs. However, the availability of product information was never considered. For business to be assumed fair, the court would necessarily have to assume that consumers know something about sucaryl. But, unbelievably, the court assumed that “when [sucaryl is] used to sweeten carbonated beverages the consumer is naturally without interest or concern as to the sweetening agent employed.” Id. at 408. Such an assumption contradicts one of the core assumptions that theoretical benign markets require: that the consumer be well-informed.

See also Appalachian Coals, Inc., v. United States, 288 U.S. 344 (1933), overruled by Copperweld Corp. v. Indep. Tube Co., 467 U.S. 752 (1984). In this case, the Court reversed the lower court’s decision that the defendants, a group of coal producers and sellers, had unlawfully restrained competition in violation of the Sherman Antitrust Act. Id. at 377–78. The Court’s final decision looked to evaluate the nature of the defendants’ actions with respect to its hindering of commerce and restricting smaller coal firms from entering the coal market. Id. at 376. The Court found that the industry the defendants were operating in was of less-than-competitive conditions. Id. Therein, the Court was left with a dilemma: allow the defendant firms to correct the prevailing imperfect market
seductive reification fallacy of assuming that extant markets mimic the ideal abstraction of the market. 23

conditions or provide legal assistance by regulating the behavior of firms. See id. at 376–78. The Court decided:

Voluntary action [by firms] to rescue and preserve these [ideal market] opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes. The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade. The intelligent conduct of commerce through the acquisition of full information of all relevant facts may properly be sought by the cooperation of those engaged in trade, although stabilization of trade and more reasonable prices may be the result.

Id. at 374. The previous reasoning assumes that the firms engaged in trade will knowledgeably help stabilize competition in the prevailing market. However, on what facts does the Court rely to make such an assumption? Perfect information and rational decision-making are characteristics of competitive markets where, in theory, firms are free to leave and enter the market. However, to assume such underlying behavior, the Court needs to analyze the behavior of the coal producers and sellers. Otherwise, such an assumption may contradict the Court's own assertion that the prevailing market was an imperfect one; because, theoretically, the validity of these assumptions help determine the structure of the market. Rather than rely on these benign assumptions about the nature of firms, the Court should consider that oftentimes the assumptions of perfect information and rational choices divert from true market conditions.

23. See Bent Stidsen, General Semantics and Economics: Some Speculations, in COMMUNICATION: GENERAL SEMANTICS PERSPECTIVES 189–201 (Lee Thayer ed., 1970). The field of general semantics uses an analogy of a map and terrain to demonstrate the reification fallacy. Id. at 189–90. The author argues that, “when economists discuss the relation between their theories (maps) and the real world (territory), they frequently reveal” a misunderstanding of how the two are related. Id. at 189. In other words, economists often assume that the map is the terrain, that the one theory of markets is how markets actually behave.

Stidsen posits that general semantics urges the use of several maps (to continue with the analogy). Id. at 189–90.

Since several maps might fit the territory of economic phenomena, the quality of some particular map must be judged both with respect to the degree to which it fits the territory and in relation to the quality of alternative maps. And that, it seems to me, is the fundamental function of any science - to enrich our collection of maps rather than to seek the one “true” map, and then use this collection as a basis for
For example, pay attention to the reasoning in Virginia State Board Of Pharmacy v. Virginia Citizens Consumer Council, Inc.,\(^24\) where the Court rules in favor of the free flow of commercial information.

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.\(^25\)

Here, the Court is confusing two things. First, its reasoning suggests that a free market is a market that is private, but a monopoly is a private market. However, a monopoly is the “solving” or “fixing” those phenomena we have come to label as “problems” or “ills.”

\(^{24}\) Id. at 748 (1976).
\(^{25}\) Id. at 765. Prior to this case, the Virginia Citizens Consumer Council filed a lawsuit against the Virginia State Board of Pharmacy and its individual members (appellants in the current case) challenging the validity under the First and Fourteenth Amendments of a Virginia statute, which declared a pharmacist guilty of unprofessional conduct, and subject to monetary penalty, for advertising the prices of prescription drugs. Id. at 752. The Court ruled in favor of the Virginia Citizens Consumer Council, in the trial and appellate courts, holding that a consumer's interest in the “free flow of commercial information” was protected by the First Amendment, as it was indispensable to well-informed private economic decisions. Id. at 763.

The problem in the Court's reasoning arises when the Court does not consider whether the market conditions necessary for the free flow of commercial information are actually valid in the aforementioned pharmaceutical market. Rather, the Court assumes that the conditions in the market at hand are that of an optimal market. In its own words, the Court chooses to assume that the “information [prescription drug advertisements] is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.” Id. at 770. Again, though, these assumptions about the behavior of sellers and consumers were never compared to the actual market of pharmaceuticals that was pertinent to this case. In other words, one would have to believe that sellers are voluntarily willing to give up certain advertising strategies that could increase their profits for the sake of maintaining a truthful and honest market. Such questionable assumptions need to be validated if market forces are going to be labeled benevolent. Otherwise, the market becomes an avenue for sellers to exploit consumers.
antithesis of what the Court says it is seeking. Its analysis shows no awareness of alternative market structures. It has little sophistication about what kind of freedom they are discussing. Furthermore, for the free enterprise economy to truly function as previously stated, certain assumptions have to be met. Those particular assumptions pertinent to this case include: (1) consumers have enough information with which to make a

26. Free market advocates often argue against government regulation on behalf of freedom. But what do such arguments mean without carefully defining the context of such freedom? Oftentimes, the problem with arguments for or against regulations is that abstractions are often thrown around but left undefined. Though this Article focuses attention to the misuse of the market particularly in the legal arena, it should be noted that this clarification problem goes beyond the legal context. See generally Edward Stringham, Market Chosen Law, 14 J. Libertarian Stud. 53, 53–77 (1998) (arguing that the market without any government intervention will naturally lead to social order). Stringham provides several reasons for why such a system socially optimal. For one, “[t]he market allows consumers to choose different types and degrees of services . . . .” Id. at 53. When such power is placed in the consumers’ hands, a high degree of consumer sovereignty can be assumed. Thus, the market that Stringham is referring to is necessarily a perfectly competitive market, because only the competitive abides by complete consumer sovereignty. The problem is that Stringham never considers that markets may vary in structure and produce different competitive conditions. Thus, until Stringham can validate that all markets mimic the perfectly competitive market, his argument is only logical in theory. Stringham goes as far as to say that “[i]f the state stopped intervening, the consumer would finally be sovereign and the market would finally be able to flourish.” Id. at 54. Stringham is reifying “freedom” as solely freedom from government intervention; the performance differences of specific market structures are given little attention. See also John Schwartz, Health Measure’s Opponents Plan Legal Challenger, N.Y. Times (Mar. 22, 2010), http://www.nytimes.com/2010/03/23/health/policy/23legal.html. In his article, Schwartz points out the arguments for and against the President’s new health care plan. The problem is, however, that when the arguments for the allocation of healthcare via the market and the arguments for the allocation of healthcare via some governmental intervention are revealed, the structure of the current healthcare market and the definitions of freedom are never clarified. Instead, we are left wondering whether negative freedom or positive freedom is being appealed to, and subsequently what effect that type of freedom would have on the current structure of the healthcare market. In other words, because freedom and the health care market are not analyzed with sensitivity to their ambiguity, the reader is shown arguments with little logical basis. Even worse, with the New York Times being a popular media outlet, the reader may falsely assume that such presentations of arguments adequately reveal the priorities of colliding arguments, when in reality they assert very little, if anything.
rational decision and (2) sellers are willing to share information to ensure consumer sovereignty and to meet consumer needs. The problem in the Court’s reasoning is that it does not consider whether the previous assumptions are actually valid in the aforementioned pharmaceutical market. In this case, the Court reifies the market in a way that would make unhindered transactions appear fair. The validity of the Court’s reification of the market, however, is never considered.

The failure of many legal scholars and judges to adequately analyze the market, though, could be grounded in a faulty conception of what constitutes the economic analysis of the law. Pay attention to the way Kenneth G. Dau-Schmidt and Carmen L. Brun in their article, Lost in Translation: The Economic Analysis of Law in the United States and Europe, extraordinarily posit that “Europe currently lags significantly behind the United States in the economic analysis of law . . . .”27 The authors’ conclusion, however, seems to be based on the fact that U.S. culture tends to be more accepting of the rational actor assumption and less desirous for government intervention; whereas, European countries tend to be more critical of the rational actor assumption and demand more government regulation. The authors, in other words, evaluate the economic analysis of law of the U.S. and Europe based on the cultural biases and moral codes that analysts adhere to, rather than the ability of these analysts to remove their cultural biases and analyze the true structure of the market. The authors unknowingly provide the logical foundation for committing the reification fallacy.

Another example in which the structure of the market is not robustly analyzed can be seen in John J. Donohue III’s article Prohibiting Sex Discrimination in the Workplace: An Economic Perspective.28 The author argues that anti-discrimination laws promote economic efficiency by “eliminating discriminators, [and]
by inducing beneficial productivity and supply curve shifts..."29 Yet, Donohue sees absolutely no need whatsoever to assess the specific nature of the markets in question; he simply assumes a competitive market structure. Consequently, the author does not evaluate the potential for market failures, asymmetrical power relations, or alternative market structures to affect his argument. The argument rests on a presupposition that the ideal abstraction of the market is indeed the actual market for which prescriptive claims are being made and thus loses saliency when applied to anything other than the elusive perfectly competitive market. Yes, had the particular market been consistent with that assumption, no producer would have had any control whatsoever over market price. In addition, all consumers would have had full and honest product information about alternative employment opportunities, and power inequities in the society would have been negligible. In those conditions and only in those conditions do the benefits of greed as a motivational device work on behalf of any respectable vision of the good.

As we will see with many of the scholarly perspectives discussed in this Article, a common presumption in legal reasoning in the United States is that one can assume markets are benign even when one has not studied their specifics.30 In

29. Id. at 1341.
30. See, e.g., AFSCME, 770 F.2d 1401, 1405–07 (9th Cir. 1985). Without examining the specifics of the market in question, the court assumed that the market behaves in a competitive fashion. Some 15,000 employees of the State of Washington brought a class action suit for violation of Title VII of the Civil Rights Act of 1964 for compensating employees in the predominantly female jobs at a lower rate than employees in the predominantly male positions. Id. at 1403. The Ninth Circuit overturned the district court’s ruling in favor of the State. Id. The appeals court referred to the fact that the state policy was to pay wages that reflect the prevailing market rates and that reliance on the market cannot be deemed as intent to discriminate against women. Id. at 1405–06. Notice how the market was held as a benign force. The court’s language is explicit that the law does not intend to “abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market.” Id. at 1407. The court is assuming that the labor market in question behaves in a competitive fashion, such that employers are relatively powerless to set wages and therefore employers should not be punished because the market values the services of jobs dominated by females less than those dominated by males. Such an assumption would hardly be
other words, the potential efficiency, security, prudence, and productivity that can be the product of managed greed are indeed realized regularly. That a group of buyers encounters a group of sellers in some market context is enough for such analysts to pledge allegiance to market logic. As one legal scholar notes, “it is extremely important to note how much common ground I share with my right-liberal opponents: we all believe in a vigorous, essentially market economy . . . .” Do this author and his opponents believe in the benevolence of all markets? Some loose aggregation of markets that provides the basis for a generalization? Or do these market mavens have detailed knowledge about most markets? Certainly there are at minimum a few markets where there are so many firms that none can affect prices or the amount of supply. But where is the fascination with the specific context in which price and quantity decisions are made? Or, in less economistic language, where is the fascination with the contractual fact pattern?

Another example of blind adherence to benign market structures is in the legal analysis of free speech; when defending speech against regulation, scholars and judges often refer to the need to maintain a free marketplace of ideas. This metaphor justified if the market structure is less than competitive.

31. See, e.g., Richard A. Epstein, In Defense of the Contract at Will, 51 U. CHI. L. REV. 947, 951, 953–54 (1984). The author makes myriad assumptions that a robust and competitive market exists between employee and employer. See id. The legal reasoning within Epstein’s article sees employment contracts as an agreement between competent and rational actors and that any governmental regulation is insulting to individual choice and autonomy. Id. at 953–54. Furthermore, arguments that there exist potentially harmful bargaining or power disparities between employer and employee are summarily dismissed. Id. at 982. Combined with the belief that the marketplace is populated with rational actors, Epstein argues that power disparities may still exist, but only within an acceptable level because employers are subject to the discipline of the competitive market. Id. at 973, 982. Unfortunately, the reader is not informed as to which employment market Epstein’s argument refers, as he appears to assume all employment markets follow abstract models of competition.


33. See discussion infra notes 86–92.

34. The following cases emphasize the importance of making sure the
marketplace of ideas is analyzed—whether the marketplace of ideas is a valid portrayal of true market conditions:

See Citizens United v. FEC, 558 U.S. ___, 130 S. Ct. 876 (2010). In this case authored by Justice Kennedy, the Court reversed the Federal Election Commission’s ban on corporate independent expenditures for electioneering communications. Id. at 876–77. The Court’s decision allegedly was meant to preserve the free marketplace of ideas.

When the FEC issues advisory opinions that prohibit speech, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.” Id. at 896 (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)). In the previous quote, the Court assumes that there is an “uninhibited marketplace of ideas” that the people are deprived of due to the FEC’s regulations in the communication market. See id. The problem is that the Court is defining an “uninhibited marketplace” as one that is free from governmental regulation. See id. In doing so, the Court overlooks the performance differences for the community that uninhibited markets, like the free competitive market and a free monopoly market, can exhibit. Rather, the Court assumes, without analyzing the prevalent market’s structure, that the uninhibited marketplace is one that adequately allocates communication rights. See id.

See also FCC v. League of Women Voters of Cal., 468 U.S. 364, 371–72, n.9 (1983). The rounds of trials in this case began with the appellee grant recipients challenging the Public Broadcasting Act of 1967 (as amended in 1981), which forbade any noncommercial educational broadcasting station that received a grant from the Corporation for Public Broadcasting to engage in editorializing. Id. at 370, n.7 (quoting 47 U.S.C. § 399). Justice Brennan stated that the point of the previous statute was “to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations.” Id. at 377. In other words, to decide whether the statute should apply, the medium whose efficiency would have to be considered is the marketplace of ideas.

Unfortunately, nowhere in the Justice’s opinion was the efficacy of the market analyzed; i.e., whether the prevailing market conditions were of a competitive nature not necessitating government intervention. Rather, the Court simply assumed the free market of ideas was prevalent whenever the First Amendment was adhered to. The following quote is an example of the court’s reasoning:

[B]ecause [i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, . . . the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences [through the medium of broadcasting] is crucial here [and it] may not
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constitutionally be abridged either by Congress or by the FCC.  

Id. at 377–78 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1989) (alteration in original) (internal quotation marks omitted)). The Court fails to consider whether the marketplace at hand is truly uninhibited; rather, the market’s optimality is assumed, and government intervention is rejected. Id. In effect, the Court rules in favor of the appellee grant recipients, holding that “the specific interests sought to be advanced by § 399’s ban on editorializing are either not sufficiently substantial or are not served in a sufficiently limited manner to justify the substantial abridgment of important journalistic freedoms which the First Amendment jealously protects.” Id. at 402.

Underlying the Court’s decision to disregard the § 399 ban on editorializing was an anti-government ideology throughout the opinion. The justice’s biases against government regulation thus presented the framework for the dissenting opinion’s critical analogy:

[T]he Court’s lengthy opinion in this case is devoted to the development of a scenario in which the Government appears as the “Big Bad Wolf,” and appellee Pacifica as “Little Red Riding Hood.” In the Court’s scenario the Big Bad Wolf cruelly forbids Little Red Riding Hood to take to her grandmother some of the food that she is carrying in her basket. Only three paragraphs are used to delineate a truer picture of the litigants, wherein it appears that some of the food in the basket was given to Little Red Riding Hood by the Big Bad Wolf himself, and that the Big Bad Wolf had told Little Red Riding Hood in advance that if she accepted his food she would have to abide by his conditions.  

Id. at 402–03 (Rehnquist, J., dissenting). In the same dissenting opinion, the negligence of the Court to acknowledge the distorting effects that certain grants would have in the marketplace of ideas is appropriately criticized:

But to me the Court’s approach ignores economic reality. CPB’s unrestricted grants are used for salaries, training, equipment, promotion, etc.—financial expenditures which benefit all aspects of a station’s programming, including management’s editorials. Given the impossibility of compartmentalizing programming expenses in any meaningful way, it seems clear to me that the only effective means for preventing the use of public moneys to subsidize the airing of management’s views is for Congress to ban a subsidized station from all on-the-air editorializing.

Id. at 406–07.

This case reveals how a jurist’s underlying beliefs present the framework for the reification fallacy to be committed. In this case, there is a tendency for decisions that simply assume that when any buyer and seller make an exchange, that exchange is akin unto one that occurs in a competitive market. What is relied upon, however, is a faulty conception of the market. This line of reasoning is central to Justice Scalia’s dissenting opinion in Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (ruling that certain political speech may be banned by the government based on the speaker’s corporate identity). At the beginning of his dissent, Justice Scalia reveals his
political inclinations: “[G]overnment cannot be trusted to assure, through censorship, the ‘fairness’ of political debate.” Id. at 680 (Scalia, J., dissenting). Thereon, underlying the entire dissenting opinion is a certain negligence to consider the negative social effects that the market is capable of producing. Such shows, again, that the act of not considering the actual structure of the market, yet appealing to market logic, is foundational for committing the reification fallacy. See infra note 57.

In Buckley v. Valeo, in which the Court struck down expenditure limits in the 1971 Campaign Act, one can see the same reluctance to consider the negative effects that economic conditions have on people’s ability to share their ideas: “The First Amendment’s protection against governmental abridgement of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.” 424 U.S. 1, 49 (1976). This type of reasoning not only can lead to faulty reifications of a utopian market, but also causes some courts to not question whether poor market conditions are affecting people’s ability to truly be free.

See also FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986). The FEC filed a complaint against the Massachusetts Citizens for Life (MCFL) corporation, insisting that the corporation had violated the Federal Election Campaign Act, 2 U.S.C. § 441b (2006), which prohibits corporations from using treasury funds to make an expenditure “in connection with” any federal election. Id. at 241. “The expenditure restrictions of § 441b are thus meant to ensure that competition among actors in the political arena is truly competition among ideas.” Id. at 259. The First Circuit “held that the statute was applicable to MFCL, but affirmed the District Court’s holding that the statute as so applied was unconstitutional.” Id. at 245. The Supreme Court affirmed the holding. Id.

The following quote reveals the Court’s inclination to accept an “optimal market”; specifically that the corporation’s behavior respected and never disturbed market conditions:

The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace. While MCFL may derive some advantages from its corporate form, those are advantages that redound to its benefit as a political organization, not as a profit-making enterprise.

Id. at 259. However, the Court does not explain the line dividing the power gained from the political marketplace and the power gained in the economic marketplace. Having even the slightest capability to profit in the economic marketplace, and thus access to a greater amount of resources, gives a political firm an edge in making their ideas more prominent in the political marketplace. All in all, instead of analyzing the market in which the MCFL competes, the Court simply presumed that the market in question was a fair market in which no firm has any abundant amount of power. Id. at 263.

The Court’s unwillingness to analyze the market at hand can be seen once again when the FEC argues that § 441b “prevents an organization from using an individual’s money for purposes that the individual may not support.” Id. at 260. In other words, the statute provides a framework for consumer sovereignty, a key component of any optimal market. The Court, however,
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gains rhetorical strength from its allusion to free markets. However, the freedom of markets is a freedom from government regulation. Ignoring the performance differences for the community between a free competitive market and a free monopoly market is analytically disappointing. For example, in a recent case, Justice Kennedy simply assumes benign market conditions, which leads to the Supreme Court’s reversing the Federal Election Commission’s ban on corporate independent expenditures for electioneering communications.

The Government has muffled the voices that best represent the most significant segments of the economy. And the electorate [has been] deprived of information, knowledge and opinion vital to its function. By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to

assumes that “[i]ndividuals who contribute to [the MCFL] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.” Id. at 260–61. Thus, “[t]he resources [the MCFL] has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace.” Id. at 259. The previous quotes demonstrate that the Court reasoned that because the MCFL gathers its funds from essentially aware and informed individuals who choose to give away their money, the FEC would have no reason to believe that the MCFL was gaining an edge in the political marketplace due to economic advantages. The previous assumption that consumers are fully aware of all of the consequences of their choices, however, is hardly ever consistent with true market conditions. Once again, the Court is reliant on the unquestioned assumption that the market at hand is an ideal market, where consumers would be sovereign and have access to “perfect information” to make rational choices. Id.

35. See Fowler & Brenner, supra note 21, at 237–39, who define freedom of speech in a way that appeals only to their argument: “First, it should be noted that the language of the first amendment protects the right of speech, not the right of access to ideas or even the right to listen.” This statement lays the foundation for their eventual argument that the broadcasting market remain free from FCC regulations. Id. at 209–10, 256. The authors essentially define freedom of speech as solely freedom from government interference. See id. at 256. However, even today people cannot simply say anything; for example, libel and slander are prohibited. See id. at 241–42. The reason for their preclusion lies in their detrimental effects on the listener. See id. Thus, the author’s attempt to define the freedom of speech in a broad manner leads to a simplification of the complex nature of freedom of speech. In doing so, the author fails to acknowledge the effects that contextual differences have on the application of the First Amendment.
their interests.\textsuperscript{36}

The free marketplace of ideas to which Kennedy refers is necessarily a competitive market because an imperfectly competitive market results in decisions that are often the fruits of asymmetric information and highly unequal access to communication pathways. To assume that voters are being deprived of ideas, as Justice Kennedy does, under circumstances where corporations are limited in their speech, implies that such corporate communications are beneficial to the interests of the community. However, for this kind of reasoning to be logical, the Court would need to explicitly make the case that the flow of information resulting from corporate communications is consistent with the needs of the community rather than with the narrower interests of the firm. In place of a robust evaluation of the communication market that would result from their finding, the Court simply assumes that the market is one composed of benign sellers who provide full and honest information to citizens. The problem is that the Court never actually analyzes the prevailing market conditions.

Even those who wish to protect the public or non-market sphere\textsuperscript{37} sometimes find it desirable to embrace the market.\textsuperscript{38} For instance, in the article, \textit{Environmental Markets and Beyond: Three Modest Proposals for the Future of Environmental Law}, Donald Elliot argues that “environmental markets” can be a mechanism for improving the environment.\textsuperscript{39} “Markets work,”

\begin{footnotesize}
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\item\textsuperscript{36} \textit{Citizens United}, 558 U.S. at ___, 130 S. Ct. at 907 (citations omitted) (internal quotation marks omitted).
\item\textsuperscript{37} See \textsc{Hannah Arendt}, \textsc{The Human Condition} (1958), for a masterful treatment of politics—her term for the public sphere where we deliberate about the community’s welfare.
\item\textsuperscript{38} See, e.g., M. Neil Browne et al., \textit{The Struggle for the Self in Environmental Law: The Conversation between Economists and Environmentalists}, 18 UCLA J. ENVT. L. & POL'Y 335, 369 (2001), for an illustration of the effort on the part of environmental law to make its peace with market incentives. While this effort makes sense where the benefits of market processes can be effective mechanisms for social benefit, market concepts work differentially in different institutional arrangements. Hence, an idea, like a market for pollution permits, has the potential for much harm or good dependent on the context in which the auction for the permits will be held.
\item\textsuperscript{39} See E. Donald Elliot, \textit{Environmental Markets and Beyond: Three}
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declares Elliot. Elliot notes several reasons why he believes that markets work. These are expressed in terms of the benefits that he presumes follow from market-based environmental reforms. While consideration of these potential economic implications is important, Elliot fails to consider the full range of social implications activated by implementing environmental markets. The failure to do so reflects the tacit belief that market practices are generally benign.

Head v. New Mexico Board of Examiners in Optometry serves as another example of the way even those who claim to be regulating the market assume the existence of certain market conditions without robustly analyzing the prevailing market structure. In this case, the Court affirmed the trial court’s ruling that the appellant’s advertising violated section 67-7-13 of a New Mexico statutes. The Court stated that the statute’s purpose was to “protect . . . citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their


40. Id. at 253.

41. Id.

42. Id. at 252–53. Elliot claims that environmental markets achieve results equivalent to command-and-control policies, but at a “fraction of the cost.” Id.

43. Additionally, one should ask whether the markets that Elliot assumes to work are the rarefied markets of textbooks. Is the author assuming that environmental markets function primarily in settings where there are no barriers to entering the market and where no firm has any control over price? Shouldn’t he tell the reader if he is?

44. While singing the praises of market reforms, supporters often neglect to engage in prolepsis, in the sense of explaining why regulation is not beneficial. Elliot does make some attempts at explaining why strict regulation is not the best solution, but often prolepsis is simply overlooked. See J. Owen Saunders, North American Deregulation of Electricity: Sharing Regulatory Sovereignty, 36 TEX. INT’L L.J. 167 (2001). Saunders traces the deregulation of energy sectors in both Canada and the U.S. Id. However, by not specifically addressing why regulation is not beneficial, he tacitly asserts that markets are simply a better solution that does not even necessitate an argument. Such tacit assertions build on the presumptions that markets are benign instruments.


46. Id. at 432 (citing N.M. STAT. ANN. § 67-7-13 (West 2011)).
eyes.”

Thus, the Court ruled that the prohibition placed on the appellants did not unlawfully hinder interstate commerce. The problem is the Court never analyzed the effect the appellant’s advertisements had on people in New Mexico. The application of the aforementioned statute relies on the existence of devious advertising behavior. Had the appellant’s advertisements been devious and of a solely selfish nature, then yes, they could threaten the optimality of market transactions. However, the Court assumed that the market would be better off without the advertisements, having not analyzed the effects of those advertisements on the people within the market. An unhindered market was concluded, but the factual basis for that conclusion was never provided.

While markets can function in incredibly productive fashion, there is no deductive basis for assuming that the social institutions that shape the size and domination patterns in a particular market will be those conducive to optimizing market benefits. Some of the greatest friends of the market have been those who spend most of their intellectual lives urging legislatures and courts to regulate markets to take advantage of what the market can accomplish, while trying to avoid many of

47. Id. at 426 (citing N.M. Bd. of Exam’rs v. Roberts, 370 P.2d 811, 813 (N.M. 1962)).
48. Id. at 432.
49. But see Raymond T. Nimmer, International Information Transactions: An Essay on Law in an Information Society, 26 Brook. J. Int’l L. 5, 6 (2000) (“Modern information markets are, and should be, largely defined by agreements and market choice, rather than by regulation. In effect, the market chooses its own direction, restrained only at the extremes by law.”). Apparently, there is little hesitation in instances like this to consider the optimality of alternative allocative and distributional mechanisms by simply claiming that the market is a wonderful entity without any explanation of the nature of the particular market being referenced.
50. See Ernst-Ulrich Petersmann, International Competition Rules for Governments and for Private Business: A “Trade Law Approach” for Linking Trade and Competition Rules in the WTO, 72 Chi.-Kent L. Rev. 545 (1996). Because the author recognizes market failures can often lead to externalities or harm the public good, the article calls for the creation of rules of trade that can maximize the international economic welfare. See id. Without such rules and restrictions placed on various market structures, the author argues, the potential for public good will not be realized. Id. While not claiming that a competitive market structure is always desirable, the author hopes to use trade
its negative tendencies.\textsuperscript{51}

Cyberlaw, one of the newer areas of business law and legal scholarship, is no less susceptible to the assumption that any market is \textit{ipso facto} an optimal market for ethical purposes. For instance, in an article on e-signatures, the author claims, “E-Sign forbids any state or federal statute from requiring a specific technology for electronic transactions. This technology-neutral approach instead allows the market to decide which technologies will best facilitate electronic commerce.”\textsuperscript{52} Another article reflects similar sentiments about the market’s ability to determine worth in a manner that has social legitimacy: “Courts generally allow the market to determine whether an invention actually benefits society more than already existing technologies.”\textsuperscript{53}

Yet, another scholar, Michael Traynor, assumes, probably quite unintentionally, that (1) one market is like any other market and (2) the shared attribute is consumer sovereignty.\textsuperscript{54} He argues, with absolutely no attention to the specific structure of any of the markets he is referencing, that product information will facilitate rational decisions.\textsuperscript{55} “[I]nformation about what protections are available and what protections may be compromised or unavailable should facilitate market choices.”\textsuperscript{56} Is this information complete? Is it accurate? Apparently such questions are unnecessary in Professor Traynor’s mind.\textsuperscript{57}

rules and regulations to foster more competitive markets, which are more attentive to the public desire and welfare. \textit{Id.}

\textsuperscript{51} \textit{See, e.g.}, \textsc{Walter Adams \& James W. Brock}, \textsc{The Bigness Complex} (1988); \textsc{Walter Adams \& James W. Brock}, \textsc{Antitrust Economics on Trial} (1991).

\textsuperscript{52} Jonathan E. Stern, \textit{The Electronic Signatures in Global and National Commerce Act}, \textsc{16} BERKELEY TECH. L.J. \textsc{391}, 402 (2001).

\textsuperscript{53} Timothy A. Worrall, \textit{The 2001 PTO Utility Examination Guidelines and DNA Patents}, \textsc{16} BERKELEY TECH. L.J. \textsc{123}, 129 (2001).

\textsuperscript{54} \textit{See Michael Traynor, Some Open Questions about Attorney-Client Privilege and Work Product in Multidisciplinary Practice}, \textsc{36} WAKE FOREST L. REV. \textsc{43} (2001).

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id. at} 46.

\textsuperscript{57} \textit{See Corey A. Ciocchetti, E-Commerce and Information Privacy: Privacy Policies as Personal Information Protectors}, \textsc{44} AM. BUS. L.J. \textsc{55} (2007) (presenting an electronic private policy reform proposal for the purpose of

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III. ALL MARKETS ARE NOT OPTIMAL MARKETS

The consequence of legal reasoning that assumes a competitive market structure is often a false sense of good or ethical action. Such assumptions, when held by legal scholars who write about business ethics, do not allow for recognition of differences among types of markets and their subsequent implications. When legal scholars write about business ethics improving the awareness of private policy information for website visitors. Ciocchetti acknowledges that “[w]eb site visitors are not appropriately reading or understanding these policies because many Web sites inconspicuously post their electronic privacy policies and make them difficult for the average Internet user to understand.” Id. at 69. Companies’ websites even have a legal incentive to limit website visitors’ awareness about their privacy policies. To assume that consumers make a decision to visit websites, with consideration of the privacy policies of the websites, simply because somewhere on the website a privacy policy is posted, overlooks any consideration as to how readable, understandable and accessible this information is. Therein lies the motive of Ciocchetti’s reform proposal for improving consumer awareness of privacy policies: “[B]ecause the average Web site visitor does not understand the implications of submitting information electronically, he or she is less likely to sense a potential misuse and withhold PII [personally identifying information].” Id. at 71. In general, this article serves as an example demonstrating the need for robust analysis of what elements actually constitute the market, specifically questioning the assumption of perfect consumer information.


59. This failure is especially unfortunate because so many of those who criticize the ethical impact of the market engage in their own kind of reification fallacy when they deride the ethics of market behavior. See, e.g., Richard Sennett, The Corrosion of Character: The Personal Consequences of Work in the New Capitalism (1998). Critics of the market tend to lash out at concentrated markets as if they are the norm. Perhaps they are, but given the habit of assuming competitive markets on the part of much of American culture, it would seem that some evidence to that effect should be a mandatory inclusion in a denunciation of the market that is true only if markets are typically anti-competitive. Sennett, for example, is denouncing the tendency of large corporations to treat workers unethically. See id. But the critique is more or less valid dependent upon the form of market that is typical in our economy. See also Barbara Rumscheidt, No Room for Grace: Pastoral Theology and Dehumanization in the Global Economy (1998), for a demonstration of how frustrating it can be listening to someone denounce “global capitalism” while paying no attention at all to the market structure, the attributes of which would either justify or refute the many vigorous criticisms offered here.
they very rarely differentiate among types of markets. Without intending to do so, they write as if markets are basically competitive.\textsuperscript{60} As its name implies, the subject of business ethics is inextricably tied to economics. In fact, many business ethicists conceptualize ethics in a way that requires the incorporation of economic principles.\textsuperscript{61} While many might assume that ethical business decisions are simply the same as any kind of ethical decisions, many of those who write within the discipline of business ethics see business ethics as something distinct from ordinary ethics.\textsuperscript{62} They often view ethics as a tool to ensure the success of the market.\textsuperscript{63} They view ethical behavior not as an

\textsuperscript{60} Justin A. Nelson, \textit{The Supply and Demand of Campaign Finance Reform}, 100 \textit{COLUM. L. REV.} 524 (2000). This article views the debate over campaign finance reform through the lens of market thinking. \textit{Id.} In prescribing that campaign finance be treated like a market, the author simply assumes, without so much as a cursory glance at externalities or various market structures, that the market is competitive in nature. \textit{See id.} No mention is given to potential market failures, nor any reason why one should assume a competitive market structure exists for campaign finance; the author states merely that the market provides a solution to campaign finance reform.

\textsuperscript{61} See George Brenkert, \textit{The Environment, the Moralist, the Corporation and its Culture}, 5 \textit{BUS. ETHICS Q.} 675 (1995).

\textsuperscript{62} For example, see William H. Shaw, \textit{Business Ethics} 5 (6th ed. 2008), where he begins his business ethics text with a statement that business ethics is simply the study of “what constitutes right and wrong, or good and bad, human conduct in a business context.” While this does not necessarily imply that he is arguing that there are different ethical standards within the business world, he later cites a well-known article in business ethics literature by Albert Carr to support his opinion. \textit{Id.} at 19–20. Carr argues in his essay that business has the impersonal character of a game that demands special strategy and an understanding of its special ethical standards. \textit{Id.} Thus, a number of things that we normally think of as wrong may be quite permissible in a business context. \textit{See Albert Carr, Is Business Bluffing Ethical?}, 46 \textit{HARV. BUS. REV.} 143 (1968).

This illustration is especially important because Shaw’s text is perhaps the single most useful pedagogical source for putting students in contact with criticisms of market logic. Yet, Professor Shaw is writing a business ethics text for business professors and business students. His text is probably already pushing the boundaries of acceptability for that audience. The type of deconstructive critique of market structure implied by the argument in this article would probably not be very sensitive to the audience’s inclinations.

\textsuperscript{63} See Marianne M. Jennings, \textit{Business Ethics} xvi (3d ed. 1999) (arguing in her introduction that, “[a] business lacking an ethical commitment will, eventually, bring about its own demise”); \textit{see also} Robert C. Solomon, \textit{It’s Good Business, in Moral Issues in Business} 33 (William H. Shaw & Vincent
end in and of itself, but as a means to an end. Because of this tendency, many focus their energies on discovering a comfortable nexus between ethics and the market, as opposed to speaking of ethics writ large.

While there are certainly many authors within the discipline who do not view business ethics as a means to this end, those
same authors often make certain assumptions about the business context of ethical decisions. Consequently, they incorporate oversimplified economic principles into their writing. These authors, for example, often assume that the market is clearly the most superior economic system and consequently encourage students or readers to make ethical decisions that incorporate the laws of the market, as opposed to encouraging students to use ethics as a tool to question the system altogether. This type of analysis makes sense if there are naturally superior traits.

66. See generally W. Michael Hoffman & Robert E. Frederick, Business Ethics (3d ed. 1995), for a text that claims to be objective in its presentation of the material while ignoring all economic systems apart from capitalism in every chapter after the initial chapter on alternative economic philosophies. The authors paid their dues to objectivity early in the book, only to ignore the critiques as inconsequential throughout the remainder of the text. See id. Other authors feign interest in critiques of capitalism by presenting arguments for socialism, but then leave little doubt about the tight link between ethical behavior and markets when they choose to use nations with failed totalitarian socialist systems as illustrative of the ethical alternative to market systems. For example, see Shaw, supra note 61, at 122, where he writes, “In the former Soviet Union, for example, government agencies decided the number of automobiles . . . to be produced each year.” Readers cannot help but be tossed into the arms of capitalism after that type of presentation of alternatives. Finally, some others are blatant in their ethical embrace of capitalism. See Fieser, supra note 63, at 465, where he notes, “it has been taken as axiomatic that capitalism is not an inherently immoral economic system.”

See also Atkinson, supra note 5, at 514–16 (calling for a friendlier and more open relationship between the legal and business disciplines with the intent of broadening ethical awareness and, thus, improving the ability to help the greatest number of people). In his article, Atkinson reveals how the separation between legal ethics and business ethics reveals each discipline’s tendency to overlook the specific elements of the other discipline, “despite their wide common ground, the theorists of legal ethics and business ethics borrow quite little from each other’s work.” Id. at 473. Thus, with one common element in the business arena being that of the market, one could assume a certain stubbornness in legal arguments to pay close attention to the specific conditions of the market. This lack of sensitivity towards the ambiguous nature of the market would reflect a lack of awareness of the specific ethical implications that specific markets project. In other words, the legal ethical arena could possibly overlook the detrimental social effects that a certain market may have. Given this little attention paid to the market, Atkinson wisely notes that “statements of ethical commitment are certainly not a guarantee of ethical performance.” Id. at 527. This article, building on the previous plea for interdisciplinary sensitivity, particularly focuses on the important ethical implications that should be acknowledged when enquiring about such a complicated idea as the market.
associated with markets or if markets are competitive. But the case for those preconditions is so tenuous that it needs to be articulated, not just presumed. Indeed, few of their analyses would be coherent were they to assume that markets have any structure other than pure competition. When they assume that the market is comprised of an aggregate of competitive firms, business ethicists miss a promising opportunity to differentiate the moral implications of different types of market economies.

The same applies in the courts. Judges frequently neglect to analyze market structure, yet assume all markets mimic the ideal conception of the market. Further, the same way legal scholars often view ethics as a means to an end rather than an end of itself, judges often adhere to such logic. Because of the leniency of the law, oftentimes judges’ underlying beliefs have significant determinative effects on court decisions. In other words, these underlying beliefs present the framework for the reification fallacy to be committed. Judges, like most human beings, want to see what is consistent with their beliefs. Thus,

67. See generally Tracey E. George & Lee Epstein, On the Nature of Supreme Court Decision Making, 86 AM. POL. SCI. REV. 323, 323–37 (1992). George and Epstein highlight that there are two types of models that gravely influence how judges conceptualize the law: the legal and extra-legal models. Id. The former stance posits that stare decisis is the fundamental determinant of court decisions. In other words, the court always follows precedent, and judges have little say, if any, in the determination of cases; all reasoning is analogical. The extra-legal model, on the other hand, sees limitations in the doctrine of stare decisis. Court decisions are underlined by external and internal non-legal factors. External factors include the “repeat player” effect when certain attorneys become familiar with judges, pressures from the larger political environment surrounding the court, and pressures stemming from congressional and presidential positions. Internal factors include personal attitudes, values and beliefs. The combination of these extra-legal factors leads the court to deviate from only relying on precedent. The present study leads to the conclusion that the legal and extra-legal models provide equally good and co-dependent frameworks with which to assess court decisions. This article’s relevance to markets lies in the fact that certain extra-legal factors can influence judges to see things that they want to see, regardless of whether those things actually exist. Thus, with economic regulation cases, judges, because of internal biases, may appeal to the ethical principles of a competitive market without warrant.

68. See THOMAS KIDA, DON’T BELIEVE EVERYTHING YOU THINK 106 (2006) (highlighting the reason why reifying the market in a benign way could actually be favorable to our psychologies). “We have a strong motivation to see things
they often see a world where all markets parallel the ideal market in their imaginations. Consequentially, a judge's value system ends up being more determinative of market conditions than actual positive economic analysis. The problem is that where most abstractions cannot be validated by looking out your window, markets, in theory, can. The specifics of market structure are determinative of regulative policies.

The market, like any other concept, has instrumental value to the extent that it meets human needs. Partisans of an idea must, perforce, make their pitch by claiming that the application of their preferred conceptual scheme guarantees social well-being. Economics, the disciplinary home of market logic, has that we want to see in order to maintain consistency in our beliefs. The more we perceive the world as supporting our beliefs, the more we think those beliefs must be true." Id.; see also Albert H. Hastorf & Hadley Cantril, They Saw a Game: A Case Study, 49 J. ABNORMAL & SOC. PSYCHOL. 129, 129–34 (1954) (examining students' perceptions after a controversial Dartmouth and Princeton football game).

69. See Phillip Blond, The Rise of the Red Tories, 155 PROSPECT MAG. (Feb. 28, 2009) http://www.prospectmagazine.co.uk/2009/02/riseoftheredtories. Though very distinct worldviews, if taken to the extreme, both economic liberalism and communitarianism rely on some form of external authority (usually a government) for their application. This tendency toward a central authority occurs because the dictates of both worldviews rely on assumptions about human nature that are far removed from our true complex selves.

But so extreme did the defence of individual liberty become that each man was obliged to refuse the dictates of any other—for that would be simply to replace rule by one man's will (the king) with rule by another. As such, the most extreme form of liberal autonomy requires the repudiation of society—for human community influences and shapes the individual before any sovereign capacity to choose has taken shape. The liberal idea of man is then, first of all, an idea of nothing: not family, not ethnicity, not society or nation. But real people are formed by the society of others. For liberals, autonomy must precede everything else, but such a "self" is a fiction. A society so constituted would be one that required a powerful central authority to manage the perpetual conflict between self-interested individuals. So the unanticipated bequest of an unlimited liberalism is that most illiberal of entities: the controlling state.

Id. The overarching point is, partisans of an idea, be it liberal or communitarian economists, need to analyze the structure of the market before seeking to supplement or regulate the market. Otherwise, economic liberalism potentially becomes a cover for monopolistic capitalism, and economic communitarianism a veil for absolute statism. “A covert alliance between the
therefore needed some way of describing the beneficiaries of the market in a manner that would appear supportive of general community values. Economics has answered this challenge by linking the social legitimacy of the market to consumer well-being.\(^{70}\) Fundamentally, markets are beneficial—the market narrative tells us—because they are responsive to consumer tastes, create an impetus for expanded production, and reduce the prices that consumers will eventually pay for the bounty emerging from the market cornucopia of goods and services.\(^ {71}\)

Therefore, markets provide *social* benefit when they transform private greed into a particular form of public benefit,\(^ {72}\) *viz.*, consumer well-being. If all markets have attributes that shape prices, income patterns, and cultural values in common fashion, and *these shared attributes enhance consumption*, then we can use what we know about stylized markets in blackboard liberal left and liberal right has destroyed incomes and identity at the bottom of the scale.” *Id.* That alliance is the negligence to analyze their assumptions.

70. See ROBERT E. LANE, THE MARKET EXPERIENCE (1991), for an impressive attempt to wrestle with this ascription of market legitimacy to optimizing consumption. Lane’s argument is that more basic human activity is work; hence, markets are socially legitimate to the extent that they facilitate the personal development of workers. *Id.* at 19–20. See also MIHALY CSIKSZENTMIHALyi, FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE (1990), for a psychological model that provides empirical support for Lane’s attempted revision of the evaluative norms for markets.

71. Compare this assertion with CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY 7 (1989), for a more sophisticated understanding of the consumption process. Taylor’s distinction between the first-order preferences of choosers—those preferences resulting from immediate readings of relative satisfaction—and their second-order preferences—the preference set after the considered self has reflected about what preferences a virtuous person should have—offers a much more complex and less mechanistic approach to studying the link between consumption and happiness, a link that has enormous implications for our judgment about the market as a preferred determinant of social value. See also Harry G. Frankfurt, Freedom of the Will and the Concept of a Person, 68 J. PHILO. 5, 5–20 (1971), for the origin of this important distinction between what we want at the moment, and what we want ourselves to want.

72. See BERNARD MANDEVILLE, THE FABLE OF THE BEES: OR, PRIVATE VICES, PUBLICK BENEFITS (1714). Market logic provides an explanation for how, what are alleged to be greedy, self-referential humans can act according to this jaundiced nature and through the magic of the market, create social benefits, while satisfying their own tastes. Adam Smith’s use of the fable of the bees provided the core idea for capitalism, its *sine qua non*. *Id.*
portrayals to analyze the social impacts of all markets. In terms of these common characteristics, what we know about any market provides us with insight about all markets, as well as a grasp of the aggregation of those markets, i.e., the market. To the extent that these lawful understandings about markets are valid, we can avoid the painstaking task of gathering facts about particular markets.

IV. MARKET CHARACTERISTICS AND ETHICAL ENDS

Are there attributes of markets that apply to all markets, such that we need not examine the particulars of markets to be able to generalize about their performance? As a starting point, it seems helpful to consider what we seek from markets. The answer is increasingly, “everything.”

However, imposing that level of expectation on any institution is akin to predetermining its failure. So, from a more fair-minded perspective, just what could we hope for the market to provide us?

We want goods and services. How can markets facilitate that process? The first potential positive attribute of markets, in general, is the speed with which they handle a massive coordination problem. Consumers want goods and services and are variously willing to purchase a number of them depending on the price. Sellers are desirous of creating and transferring the goods and services to consumers at an array of potential prices. Markets are conceivably capable of providing a rapid reading of those preferences and create incentives for the parties to arrive

73. See Robert Kuttner, Everything for Sale: The Virtues and Limits of Markets (1997), for documentation of the extent to which market logic is increasingly being applied to what had hitherto been clearly demarked as public sector responsibilities. Prisons and schools are but two of the illustrations. Id.

74. See Buford Curtis Eaton et al., Microeconomics 11 (4th ed. 1999), for the standard discussion involving the creation of equilibrium price and quantity. This coordination of different parties and their respective interests is an immense facilitator to exchange. See id.

75. See also Ronald G. Ehrenberg & Robert S. Smith, Modern Labor Economics (6th ed. 1997), for the analogous logic as it applies in labor markets. Here, the buyers and sellers are different entities than they are in product markets, but the coordination problem between buyers and sellers of labor is highly similar. See id.
at an exchange. No political mechanism can come close to matching the seeming automaticity of this coordinating accomplishment when optimal market conditions are present. The ethical component of this automaticity is tied to fairness. An automatic process cannot cheat, abuse, or discriminate against anyone. Automatic processes are, thus, more likely to treat us consistently according to Kantian deontology, virtue ethics, or a feminist standard of care ethics.

A second potential positive attribute of all markets is their efficiency, at least as long as we define efficiency in terms of cost reduction. Markets encourage the producer to seek and take advantage of potential sources of cost reduction. From the perspective of the seller, a cost reduction results in greater potential earnings for the firm. This impetus is extraordinarily valuable to society because the resources saved by that cost cutting could then be used to satisfy additional consumer preferences.

A third potential universal positive attribute of markets is their alignment with private property and the consequent acceleration of the work ethic. Although economics texts insist on referring to participants in the economy as if they have one level of prospective output at a particular level of compensation, simple introspection tells us that each of us is capable of many different levels of output dependent on the social context within which we are asked to produce. Given the right conditions,

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76. See Walter Nicholson, Intermediate Microeconomics and Its Applications, 272–73 (7th ed. 1997), for a standard discussion of the cost cutting impetus implicit in market incentives. Whether cost cutting tendencies are socially beneficial depends on the ultimate beneficiary of those endeavors. See id. If cost reductions result in price reductions, then this sort of efficiency has clear social benefits. See id. When, however, they result in extra profits for the owners or compensation for management, the link between this positive attribute of markets and social welfare is more tenuous. See id.

77. See David C. Colander, Microeconomics 474 (4th ed. 2001), where the decision to hire and compensate is based on the worker’s “marginal physical product”—a magnitude of output that is presumed to be forthcoming from the worker apparently because that output is the solitary potential output that such a worker can provide. The idea that the labor market is a social institution that can generate multiple potential outputs from any given worker is ignored. See generally Robert Solow, The Labor Market as a Social Institution (1990).
markets, through their association with private property, hold out the promise that personal striving to produce will result in personal gain. One need not deny the social and altruistic dimension of human nature to recognize the attractiveness of economic incentives for technological progress and a heightened work ethic.

This section should not end without some attention to an alleged universal positive attribute of markets that is a regular component of the case for market hegemony in social affairs. Market partisans make the claim that the market, in any of its manifestations, encourages political freedom through its apotheosis of personal freedom in market affairs. However, this

79. See Amitai Etzioni, The Moral Dimension: Toward A New Economics (1990), for ample evidence from social psychology that humans possess what Etzioni refers to a “we-ness” dimension, an affiliative urge that brings us together for common purpose. However, Etzioni is equally assertive in documenting our acquisitive urge, our “me-ness.” Id. This ambivalent self does not do serious damage to the positive role played by market incentives in promising personal gain to the economic agent who innovates or excels.

See also Nicholas D. Kristof, Op-Ed., Our Basic Human Pleasures: Food, Sex and Giving, N.Y. Times, Jan. 16, 2010, http://www.nytimes.com/2010/01/17/opinion/17kristof.html, for a short synopsis of several neurological and psychological studies on the link between thinking about others and happiness. Kristof goes as far as to quote: “The most selfish thing you can do is to help other people . . . .” Id. See Jorge Moll et al., Human Fronto–Mesolimbic Networks Guide Decisions About Charitable Donation, 103 Proc. Nat’l Acad. Sci. U.S. Am. 15623 (2006), for one of the studies discussed in Kristof’s article. The study involves encouraging human subjects to think of charitable acts and then studies the different parts of the brain that are activated. Id. at 15623–26. The study found that the parts of the brain normally associated with selfish pleasures like sex and eating lit up. Id. The implication derived therefrom is that altruism may be one of our most primal instincts. Id. at 15625. Though, Kristof, Jorge Moll, and others emphasize the link between happiness and giving, the explanations for altruistic behavior are varied and great in number. See Richard Dawkins, The Selfish Gene (1989), for a discussion on the notion of helping another organism through self-interest. Dawkins posits that genes that allow a person to survive and reproduce also improve the chances of the genes themselves being passed on. Id. Thus, for example, it can be reasoned that altruistic behavior seen between related individuals can be the product of genes acting in a way that maximizes their chances to be passed on over generations. See id.

80. See Milton & Rose Friedman, Free to Choose (1990), for the most persuasive form of this argument. If we conceptualize freedom as indivisible,
claim relies heavily on the assumption that all markets mimic the decentralized structure of competitive markets. When markets diverge from that norm, their tendencies toward “creative destruction” can threaten the democratic ethos upon which political liberty is built. For example, look at the unfortunate way that freedom is appealed to in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., when inquiring about the dangers of advertising: “It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.” The Court seems to have little sophistication about what kind of freedom they are discussing. Are we to assume freedom in a monopolistic market and if we define freedom, in its negative form, as “freedom from,” then the spirit of liberty experienced by the private property owner should carry over into his and her ordering of the state and its activities. Consequently, a market participant would be ever vigilant for threats to political freedom. But see, Elton Rayack, Not So Free to Choose: The Political Economy of Milton Friedman & Ronald Reagan (1987), for a well-reasoned critique of this linkage between markets and political freedom.

81. See Richard Bellamy, Liberalism and Modern Society: A Historical Argument 3 (1992), for an analysis of this tendency. Traditionally, liberals have avoided the problem of the conflict among liberties by assuming “society would develop in a direction which would lead to the harmonization of individual life plans.” Id. The idealized process involved “market relations between small-scale entrepreneurs” seen as “the basis of a meritocratic society of self-reliant and responsible citizens, who freely contracted with each other for their mutual advantage and were moved by an invisible hand towards individual, social, material and moral improvement.” Id.


84. The Court’s negligence to clarify what they mean by the freedom they are appealing to can be seen by contrasting the reasoning in Virginia State Bd. of Pharmacy with that in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). In the contrasting case the Court found that the regulations that the FCC had imposed on the Red Lion Broadcasting company were constitutional because the regulation allowed listeners to be able to listen to both sides of issues. Id. at 368. Notice how the Court acknowledges the inherent ambiguity of “freedom of speech,” and proceeds to clarify what it defines as “freedom” in the current case:

The right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others . . . . Otherwise, station owners and a few networks
is the same as freedom in a competitive market? By searching for avenues whereby competing sellers can be destroyed,\cite{85} a firm attempts to build foci of concentrated power quite similar in effect\cite{86} to those that markets are said to restrict in the political sphere. The possibility of internal contradiction is strong here.

V. THE ETHICAL PROBLEM OF ALL MARKETS

The primary objective of this Article has been to heighten respect for the ethical potential of greed in certain kinds of markets in certain regulatory regimes. While there is little that can be said that is ethically positive about market outcomes in any and all markets, the same is true for the ethical hazard associated with all markets. Critics of the market, no less than

would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. \textit{Id.} at 387–92. In other words, rather than simply stating that the First Amendment will take care of any discrepancies, the Court acknowledges that the First Amendment can be applied in various ways. In this case, for example, it implies that freedom has its limits when the consequences of one’s actions have the potential to negatively affect someone else. \textit{See id.} at 369.

85. Joseph Schumpeter coined the term “creative destruction” to capture his greatest fear about the self-destructive nature of capitalism. \textit{See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 134–47 (3d ed. 1950), for a description of the tendency of large firms to cannibalize small, owner-operated firms thereby weakening the democratic political base for capitalism. Especially significant to the demise of capitalism that Schumpeter predicted was the growth of a group of intellectual critics of capitalism, whose existence will have been made possible by the increases in income and wealth that permit the flourishing of those who “wield the power of the spoken and the written word.” \textit{Id.} at 147. \textit{See also MICHEL ALBERT, CAPITALISM VS. CAPITALISM} (Paul Haviland trans., 1993), for an alternative version of creative destruction. The author, a French businessman, highlights the tendency of firms to focus on short run profit in an effort to surpass the performance of their rivals. \textit{Id.} at 62–83. He warns his readers that this strategy places the community at risk and the likely reaction by the public will be devastating to business. \textit{Id.}

86. \textit{See JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 212–17 (1992) (denouncing the tendency of the large concentrated firm—increasingly hegemonic in modern society—to promote social attitudes that tout the importance of consumption as an avenue to the good life, while largely ignoring the qualitative dimensions of human development).}
its advocates, have a responsibility to familiarize themselves with the contextual details of the markets they are eager to evaluate. However, legal scholars should recognize in their reasoning that one market flaw that is universal, applying it to those where the typical seller resembles the tiny competitive firm, as well as to those constituted by multinational conglomerates. Markets encourage valuation procedures that encourage the production and consumption of those things that can be easily measured and ranked by individuals in the

87. In other words, the same way the market is often assumed to be a benign instrument for a good society, antagonists of the market are often inclined to view the market solely as a social hazard. This Article aims to progress past both of these views by emphasizing that the ethical implications of the market fundamentally rely on the validity of the underlying assumptions of the market one is talking about, as opposed to people’s devotion to certain values.

See, e.g., Semler v. Or. State Bd. of Dental Exam’rs, 294 U.S. 608 (1935). In this case, the Court prohibits the appellant, a dental practitioner, from advertising to the public. Id. The appellant, however, argues that “the superiority he advertises exists in fact, that by his methods he is able to offer low prices and to render a beneficial public service contributing to the comfort and happiness of a large number of persons.” Id. at 611. The Court, however, assumes that the dentist’s firm conducted its business in poor market conditions: “[I]t could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such [deceptive] advertising methods to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.” Id. at 611–12 (internal quotation marks omitted). The Court essentially assumes little consumer rationality and faulty information, without actually analyzing the consumers for whom the dentist provided services. For example, the dentist may have appealed to a higher class of people who were aware and informed enough to make their decision of whether to seek the dentist’s services. In such conditions, the Court would have erred in their decision; however, market conditions were never analyzed.

88. See THE POLITICS OF ARISTOTLE 31 (Ernest Barker ed. & trans., 1946), where in Book 1, Aristotle distinguishes between two types of market behavior: the economic and the chrematistic. The former seeks acquisition only with respect to the object’s primary use to satisfy a human need. See id. This type of market activity has an end point in that once those household needs are met, a person can pursue virtue. However, chrematistic endeavors have no end, for their purpose is to acquire more than is acquired by others. Hence, Aristotle feared the seductive ability of chrematistic drives to take people’s attention away from consideration of the qualities of a good life. See id. Chrematistic behavior leads to the vice of pleonexia, the tendency to want more than is proper, in the Aristotelian perspective.

89. HANNAH ARENDT, BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN
monetary units that signal and reflect market behavior. However, those dimensions of the human experience, like caring, honesty, and beauty, which are not as easily amenable to financial calculation, are thereby discounted as inferior pursuits.

This negative dimension of markets can be illustrated powerfully by a discussion of friendship. Market interactions between buyers and sellers are deficient in terms of their valuation of numerous human needs. Consider, for example,

Political Thought 31–32 (1968).

Values are social commodities that have no significance of their own but, like other commodities, exist only in the ever-changing relativity of social linkages and commerce. Through this relativization both the things which man produces for his use and the standards according to which he lives undergo a decisive change: they become entities of exchange, and the bearer of their ‘value’ is society and not man, who produces and uses and judges.

Id. This observation by Arendt captures her fear that personal judgments fail to be attentive to the social needs of the community. See id.


91. But see Wilfred Dolfsma, The Consumption of Music and the Expression of VALUES: A Social Economic Explanation for the Advent of Pop Music, 58 Am. J. Econ. & Soc’y 1019, 1020 (1999), for the argument that markets are vital measuring rods of our values. The market plays a crucial role in expression of values, he argues, by assigning a market value (price) to those commodities that we desire to consume as a representation of who we are. Id. at 1020, 1034.

92. See generally Elizabeth Anderson, Value in Ethics and Economics (1993), for an explanation of the incommensurability of many human wants. In addition, Professor Anderson points out that market preferences are accepted in market-oriented cultures with no attention to why people want what they want. Id. at 146. The market measures and responds to expressions of preference with no apparent concern about the extent to which the preferences are reflective, or even whether they emerged from the considered assessment of the prospective buyer. Id.

93. Each of us plays multiple roles. What I may want in the marketplace as a customer may well be markedly different from what I wish the community to have when I speak in a public forum or mark my vote on election day. See Vicki Been, Comment on Beatley and Collins’ Smart Growth and Beyond: Transitioning to a Sustainable Economy, 19 Va. Env’tl. L.J. 323 (2000). “As many observers within both the smart growth and the sustainable development movements have pointed out, there is a difference between the market choices people make as consumers and the values they hold as citizens and parents and
Kenneth Hoover’s summary of Erik H. Erikson’s seminal work on the elements of human identity. Erikson discovered that our human development requires at least two experiences in addition to a general sense of competence: (1) community, a sense of belonging in a socially recognized structure where one’s competencies are appreciated and (2) commitment or neighbors. Id. at 325.

96. Market resolutions of economic conflict are derived from foundational individualism. Individualism is characterized by the elevation of the interests of the individual over the interests of the community. See Harry C. Triandis, Individualism & Collectivism (1995), for a definition on collectivism.

Collectivism may be initially defined as a social pattern consisting of closely linked individuals who see themselves as parts of one or more collectives (family, co-workers, tribe, nation); are primarily motivated by the norms of, and duties imposed by, those collectives; are willing to give priority to the goals of these collectives over their own personal goals; and emphasize their connectedness to members of these collectives.

Id. at 2. Alexis de Tocqueville was among the first scholars to label certain thought patterns as “individualism.” In Democracy in America, he writes:

Individualism is a novel expression, to which a novel idea has given birth. Our fathers were only acquainted with égoïsme (selfishness). Selfishness is a passionate and exaggerated love of self, which leads a man to connect everything with himself, and to prefer himself to everything in the world. Individualism is a mature and calm feeling, which disposes each member of the community to sever himself from the mass of his fellows, and to draw apart with his family and his friends; so that, after he has thus formed a little circle of his own, he willingly leaves society at large to itself. Selfishness originates in blind instinct: individualism proceeds from erroneous judgment more than from depraved feelings; it originates as much in deficiencies of mind as in perversity of heart.

Selfishness blights the germ of all virtue: individualism, at first, only saps the virtues of public life; but, in the long run, it attacks and destroys all others, and is at length absorbed in downright selfishness. Selfishness is a vice as old as the world, which does not belong to one form of society more than to another: individualism is of democratic origin, and it threatens to spread in the same ratio as the equality of condition.

Alexis de Tocqueville, Democracy in America 98 (Francis Bowen & Phillips Bradley eds., Henry Reeve trans., First Borzoi ed. 1945).
interconnectedness.\textsuperscript{97} Neither of these essential human needs is available at the mall, and even if it were, we should be highly skeptical of its quality. To believe that the forces of supply and demand provide optimal estimates of resource value requires one to believe that the proper meaning of society is nothing more than the aggregation of individual preferences.\textsuperscript{98}

Friendship is also highly illustrative of a domain of relationships where markets fail us. The point here is neither to say that people go to the store to find friends nor to contend that friendships cannot emerge from market exchange relationships. That we just might find a friend from barter and trade in no way argues that the market setting is hospitable to the establishment of friendships. Participants in market exchanges often profess disappointment at the absence of trust in their interactions.\textsuperscript{99} Trust, as we all know, is a central basis for friendship. The essential elements of friendship point the way to enhanced consumer trust, but that way is one that sellers may have good reason to resist. Perhaps businesses depend on behavior patterns that guarantee extensive elements of mistrust\textsuperscript{100} among their prospective buyers. If so, trust will be often lauded, but rarely will it be sought in any serious fashion from market transactions.\textsuperscript{101}

\textsuperscript{97} See ERIKSON, supra note 95.

\textsuperscript{98} That these preferences are articulated as if everything has a monetary value commensurable with alternative uses of resources means that any important human dimension that is not smoothly monetized is disadvantaged in the calculations. See HANNAH ARENDT, THE HUMAN CONDITION 165 (2d ed. 1998), for a well-developed argument that in a commercial society everything becomes little but an exchange value, a commodity.


\textsuperscript{100} See JANE JACOBS, \textit{SYSTEMS OF SURVIVAL} (1992), for the argument that the great web of trust upon which so much business depends is in a deplorable state.

\textsuperscript{101} See PAUL BLUMBERG, \textit{THE PREDATORY SOCIETY: DECEPTION IN THE AMERICAN MARKETPLACE} 10–19 (1989), for documentation of mistrust in market relationships. For fifteen years, Professor Paul Blumberg asked his students at the City University of New York to share any experiences from their jobs that reflected dishonesty or deception. Approximately twenty-five percent of the students reported nothing. Approximately half of those who did report deception from their jobs claimed that these practices were frequent. The informants almost all claimed that they had been given explicit instructions.
Testimony from extensive interviews with high-level corporate managers, supplemented by interviews with thirty recent graduates of the Harvard MBA program, suggests that mistrust in market relationships is an adaptive necessity. When a market exchange is anticipated, the prospective buyer begins to conceive of the exchange with certain presumptions. One of the most significant of these initial consumer dispositions is the extent of trust the prospective consumer brings to the anticipated bargaining process. Businesses certainly would like for trust to be extensive; trust is powerful lubrication for a market exchange. Yet trust in this setting is apparently a scarce ingredient.

A second incongruity between friendship and market exchange is caused when buyers and sellers do not enter negotiations with equivalent resources or knowledge. For example, sellers sometimes control the information about their products and services. Sellers reveal the information they

from their bosses or supervisors to do what they reported to Blumberg. When they expressed reluctance, their employers assured them that everybody in the business did those things. What did they report?

1. Marking up prices one week before a sale so that they can be marked down during the sale.
2. Changing the size tickets on unpopular-sized garments to move the inventory.
3. Left and right shoes of different sizes, whose mates have gone astray, are made into pairs with re-marked sizes.
4. Tap water put in spring water bottles and sold at spring water prices.
5. Butchers who scraped the mold off meat long past its prime, then washed it in salt water, repackaged it, altered the date, and then sold it as fresh.
6. Restaurants that substitute less expensive types of fish for more expensive ones on the menu when they are similar in appearance.

While there is a possibility that Blumberg’s student observers were creating these illustrations to serve a gullible professor, the data presented in the next two notes provides credibility to their claims.

102. Miller, supra note 5.
104. See JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM (1952), for a denunciation of this form of controlling the actions or of affecting the income and property of other persons.
wish to reveal and retain the rest.\textsuperscript{105} When tobacco firms and tire companies tell us only what they want us to know, they are moving toward the sale. Whether that sale is in the consumer’s best interest is probably of some importance to them, but that importance is overwhelmed by their drive to achieve personal and organizational success by pushing the sale forward. Thus, there is an incentive to behave at an inferior moral level.

Markets enhance consumer well-being in the sense of satisfying their inclinations only to the extent consumer choices are enlightened by accurate information.\textsuperscript{106} Otherwise, consumers are selecting a chimera, a caricature of what they think they have purchased.\textsuperscript{107} Liberal thought depends on the strength of this protective function to justify its advocacy of the minimalist state.\textsuperscript{108} The integrity of the market leans heavily on

\textsuperscript{105} Ciocchetti, supra note 57.

\textsuperscript{106} See, e.g., Ala. Power Co. v. Fed. Power Comm’n, 511 F.2d 383 (D.C. Cir. 1974). The Federal Power Commission proposed a regulation to augment its ability to collect data and information from power companies. \textit{Id.} The data collection is necessary to conduct accurate environmental studies and to the creation of environmental protections. \textit{Id.} Such information also helps consumers determine which fuel companies are environmentally friendly, thus allowing for greater consumer control over the fuel market. However, the power companies claimed that the regulation (to collect data and information) created anti-competitive behavior because it put some firms at a disadvantage when negotiating for fuel supplies. \textit{Id.} Because the power companies merely asserted that the dissemination of the requested information led to anti-competitive behavior, the court recognized that the market assumptions were unfounded; and hence, there was no reason to believe anti-competitive consequence would follow from the proposed regulation. \textit{Id.} This case is an excellent example of judicial thought that does not merely assume away the problem of alternative market structures. \textit{Id.} The court understood that the economic effects that flow from changed market conditions depend on how the market in question behaves. \textit{Id.} In this case, the power market was not competitive, and the requested information could lead to greater consumer sovereignty and thus greater legitimacy to the power market. \textit{Id.}

\textsuperscript{107} See Nancy K. Kubasek, \textit{The Artificiality of Economic Models as a Guide for Legal Evolution}, 33 CLEV. ST. L. REV. 505, 511–12 (1985), for a warning concerning the analytical dangers lurking in the presumption that the consumer and seller enter the bargain with similar appreciation of the attributes of and options to the good or service.

\textsuperscript{108} The economic creed of classical liberalism leans heavily on the efficacy of the buyer to represent her or his own interests effectively in exchange relations. The invisible hand process is helpful to consumers only on the assumption that the consumer is equipped to articulate accurate price signals,
the honesty of the information that finalized the exchange. Furthermore, responsiveness of the market to consumer needs requires that sellers acknowledge the reasons why consumers enter and exit certain markets.  

The seller cannot escape the dictates modeled so well by supply and demand curves. The interests of buyers and sellers are clearly identified as distinct from each other. The terms of a market exchange are then determined by the allocation of power that shapes the interaction between these two interests.  

What can we conclude from this investigation of the awkward relationship between all markets and friendship? The market’s focus on maximizing output oftentimes minimizes public health, welfare, and the other elements of the lifeblood of a community. In other words, the market may excel at what it does, but what it does is a very incomplete portrayal of what it means to be human. Thus, all market narratives need to be moderated by injections of respect for important dimensions of human development that do not flourish in market valuation processes. While Francis Bacon warns us that without friends, the world is but a wilderness, the way out of that particular wilderness is something other than immersion in market culture.


110. See John Kenneth Galbraith, Power and the Useful Economist, 63 Am. Econ. Rev. 1, 6–7 (1973) (arguing that once corporations are only remotely subject to market discipline because of their financial and political power, it should be presumed that their interests diverge from the interests of the public).  


113. Lane, supra note 69.
VI. THE ATTRIBUTES OF A PARTICULAR MARKET DETERMINE ITS ETHICAL IMPACT\textsuperscript{114}

Prospective purchasers face eager sellers in a market for the purpose of exchanging goods and services for money. Despite the social anodyne of surface courtesy, each buyer and each seller wants to do as well as he or she can. The consumer wants to maximize his utility with a given budget of money. Pursuing this maximization, he benefits by a low price for the goods and services. On the other hand, the firms that sell the products want to increase their profits.\textsuperscript{115} Hence, the firms are interested in selling goods and services for a high price. Consequently, a key feature of all markets is a struggle over price and the attendant quality of any good or service. Markets are arenas for personal achievement.\textsuperscript{116} Domination is what is being sought.

The results from the struggle vary in important ways in different contexts. These contexts or market structures create institutional opportunities and restrictions that move the struggle in particular directions.\textsuperscript{117} In some market structures or
forms, the struggle primarily benefits the buyers; in others, the seller is the primary beneficiary . . . . Where is the ethical legitimacy in the reconciliation of this conflict? To establish that legitimacy, mainstream economic thought and any legal theories derived therefrom make certain assumptions about the market. These assumptions align themselves with the democratic values of equality and autonomy so necessary for social legitimacy in our culture. The most basic of these assumptions is consumer sovereignty: Consumers hold the power, permitting the invisible hand to guide market transactions toward socially acceptable results. Consequently,


A market can be simply defined as a social system in which individuals pursue their own welfare by exchanging things with others whenever trades are mutually beneficial. Economists often begin their discussions of the market by conjuring up the Robinson Crusoe society, where two people on a lush tropical island swap coconuts and small game animals. They trade to make each person better off, but since each person always has the option of producing everything for himself, trading is never an absolute necessity for either one.

Id. Stone continues,

The theory of markets says that as long as exchanges meet these conditions of being both voluntary and fully informed . . . they lead to the goal of allocative efficiency: Resources always move in a direction that makes people better off. This is because exchanges are choices . . . . Since no one would voluntarily exchange in a trade that made him or her worse off, and people would engage in trades only when at least one side was made better off, all voluntary exchanges must lead to situations where at least one person is better off and no one is worse off.

In the theory of markets, voluntary exchanges transform resources into something more valuable.

Id. at 68. See generally Martha Nussbaum, Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics, 64 U. Chi. L. Rev. 1197, 1197–98 (1997) (describing how the Law and Economics movement has been built on a specific set of conceptual foundations, which are from mainstream neoclassical economics).


120. For market logic to be compelling, the ultimate beneficiary of the
a market structure is optimal only when it is consistent with consumer sovereignty.

Notice how Justice Cole’s concurring opinion in *Dupre Transportation Inc. v. Louisiana Public Service Commission* rests upon certain market assumptions. These assumptions underlie the reasoning and serve to grant legitimacy to the market as a solution to the issue in dispute. He opines that the State should grant a required permit to the motor carrier because “the economy and the public interest thrive when rational men and women are left free to choose.”

What is the market structure of the Louisiana motor carriers? Justice Cole assumes, without justification, that the motor carriers operate in a competitive market, allowing rational consumers the opportunity to be free to choose.

The belief that markets are benign allies resonates with the belief that markets can determine the worth of the product. To claim that the market can accurately determine the worth of a product is to assume several things:

1. That consumers are well informed;
2. That people have the deserved amount of income with which to buy goods;

 economic process must be some surrogate for everyone; the consumer plays this role in market thought. See M. NEIL BROWNE & JOHN H. HOAG, UNDERSTANDING ECONOMIC ANALYSIS 81 (1983).

[P]rices represent consumer signals to producers concerning how many resources should be devoted to production of a particular good or service. Prices also provide consumers with information concerning the availability of resources for production. Consumer sovereignty refers to consumer control over what is produced and the form the production will take.

*Id.*

121. 583 So. 2d 475, 481–82 (La. 1991) (Cole, J., concurring).
122. *Id.* at 482.
123. *Id.* “The public, in whose interest the legislature purports to speak, is best served when the forces of competition are allowed to dictate both the number of participants in a market and the prices they will charge for their services.” *Id.* However, little is done to examine the extent of the “forces of competition” within the Louisiana motor carrier market.
124. Assuming individuals have the capacity to make rational decisions, particular market structures can create power disparities between buyer and seller, diminishing consumer sovereignty.
3. That consumers are rational;
4. That the market is free from the distorting effects of externalities and public goods and services; and
5. That there are many buyers and sellers who buy or sell only a fraction of the quantity exchanged.

First, one must believe that consumers have abundant product information. Perhaps consumers have more information about previous technology and thus are reluctant to purchase the new products. This reluctance does not mean that the product would not be more beneficial to society.

A second assumption of the consumer sovereignty argument is that all persons must have the deserved amount of income with which they can purchase those products. If one believes that the income distribution is unfair, then one could not agree that the market could properly determine the worth of a product. Without fair income distribution, people lack purchasing power, thereby making product distribution inequitable.

125. One assumption not discussed in this Article is that markets can determine any value at all. Perhaps the value of a product is different for every individual. If so, then the market price is relatively meaningless. The general assumption, however, is that markets can accurately pinpoint a value. See Mark Bartholomew, Protecting the Performers: Setting a New Standard for Character Copyrightability, 41 SANTA CLARA L. REV. 341, 353 (2001). The author claims that certain types of property—specifically “fungible property”—can be replaced with goods of “equal market value.” Id. Thus, the author is assuming that two items of property can be of equal value to one another. See id.

126. See Michael Traynor, Some Open Questions about Attorney-Client Privilege and Work Product in Multidisciplinary Practice, 36 WAKE FOREST L. REV. 43, 46 (2001). The author assumes that product information will facilitate rational decisions. “Information about what protections are available and what protections may be compromised or unavailable should facilitate market choices.” Id.

127. In addition to the fairness of income distribution being questioned, one should also question whether the market value of a product reflects can and does reflect the personal value of the product to individuals. See Vicki Been, Comment on Beatley and Collins’ Smart Growth and Beyond: Transitioning to a Sustainable Society, 19 VA. ENVT. L.J. 323, 326 (2000). “As many observers within both the smart growth and the sustainable development movements have pointed out, there is a difference between the market choices people make as consumers and the values they hold as citizens and parents and neighbors.” Id. at 325.
For markets to work as touted, one must also assume a high degree of consumer rationality.\textsuperscript{128} The consumer must calculate the benefits and costs of all potential products and sellers prior to occupying a demand curve for the ethical promise of markets to be realized; in other words, the market should abide by consumer sovereignty that reflects second order preferences.\textsuperscript{129} However, as with the very idea of the market, rationality is overtly oversimplified when used in economic language. This oversimplification is usually discounted.\textsuperscript{130} For example, consider

\textsuperscript{128} See generally Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CALIF. L. REV. 1051 (2000) (arguing that law and economics is underlied by an unrealistic behavioral assumption: that people act rationally (rational choice theory)). Korobkin and Ulen, throughout their article, highlight the grave importance that such foundational assumptions have on the application of the law. The evidence they provide of the flawed assumption of the rational actor lays foundation for their eventual plea for the merger of the behavioral sciences and the law. The article’s demand for a more robust legal understanding of the behavior that underlies economic systems aligns itself perfectly with the present Article’s plea for sensitivity when referencing the market.

\textsuperscript{129} But see Robert S. Adler, Flawed Thinking: Addressing Decision Biases in Negotiation, 20 OHIO ST. J. ON DISP. RESOL. 683 (2005) (presenting a myriad of different biases that cause seemingly normal individuals to stray away from the rational actor model about which so many disciplines theorize). The article as a whole seems to be a plea for legal intervention so that individuals can realize their capabilities of acting at least close to rational. See also Browne et al., supra note 113 (highlighting the volatility of the rational actor assumption that the market, and interestingly, the American jury system, fundamentally rely on); Robert C. Ellickson, Bringing Culture And Human Frailty To Rational Actors: A Critique Of Classical Law And Economics, 65 CHI.-KENT L. REV. 23 (1989) (highlighting that arguments on behalf of the rational actor model have little factual basis); Russell Korobkin & Chris Guthrie, Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer, 76 TEX. L. REV. 77, 78 n.4 (1997) (highlighting that the “rational” nature of litigants and their lawyers needs to be carefully considered if one is going to assume fair litigation settlements); Arthur Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 VA. L. REV. 451 (1974) (asserting that the law exaggerates the assumption of the rational actor beyond humans’ actual cognitive capabilities).

\textsuperscript{129} See Michael B. Kelly, The Phantom Reliance Interest in Tort Damages, 38 SAN DIEGO L. REV. 169, 172 (2001). The author of this article assumes that participants would act rationally, in the sense that they would try to maximize their self-interest. In one example, the author notes that the “plaintiff could keep the land if she valued it more highly than the market, thus ending up slightly better off than she was before . . . .” Id. at 172 n.17.

\textsuperscript{130} Contra Daniel A. Farber, Toward a New Legal Realism, 68 U. CHI. L.
the following passage from a law review article:

In economics, the argument for this picture is simply that market actors who commit systematic errors will lose out to actors who do not, because market participants can profit by forming expectations that are accurate on average . . . . Law professors may accurately diagnose systematic judicial errors without having the least ability to displace the judges in the way that new market entrants might displace systematically confused firms. In general the rational expectations thesis is an unlikely picture of judicial learning.\textsuperscript{131}

While the author recognizes that the “rational expectations thesis” cannot be applied by judges, she does not dispute the possibility that it can be applied to market participants.\textsuperscript{132} The persistent belief that market participants act rationally surfaces in another legal article regarding the regulation of privacy on the Internet.\textsuperscript{133} The author writes:

If consumers object to websites collecting data about them and possibly forwarding it to third parties, consumers can choose not to do business with the sponsors of those websites—just as consumers can make the same choice with companies doing business that way in the physical world.\textsuperscript{134}

The above claims assume that consumers will act rationally in the sense that they will avoid websites that invade their privacy. The author goes on to use this claim as support for anti-
regulation of the Internet, the market will regulate the need for privacy. This reasoning is flawed however, because it assumes total consumer information. What is the likelihood that most consumers know which websites are compiling data on them and which are not? Presumably, consumers are uninformed about such matters. If we deem that consumers are uninformed, then the claim that the market will regulate itself is flawed.

Yet another assumption that adherents of the market need to be sensitive to is that markets are free from the distorting effects of externalities. Even the competitive market does not provide a price equal to the social value of the resources used to create a good or service when negative or positive externalities are involved in the production, distribution, or consumption of the good or service in question. In effect, people other than the buyer or seller are being affected by the exchange of the good or service in question, but these so-called third parties are voiceless with respect to market price determination. The problem with not acknowledging externalities is that market prices do not account for the undesirable effects that transactions can place on individuals not involved in the trade. The reason for this is

135. Id. at 1060–61.
136. See Jerry Kang and Benedikt Buchner, Privacy in Atlantis, Market Regulates Information Best, 18 HARV. J.L. & TECH. 229 (2004), for a playwright-style scholarly discussion about the main alternative views on the regulation of privacy, i.e. “the dignity approach” and “the market approach.” For example, Kang and Buchner present the argument that “the market” can be trusted to determine how much privacy individuals are entitled to. Id. at 230–33. Throughout the play, although not made fully explicit, one can see that both approaches rely on different assumptions about human nature and market structure. Id. The underlying question that can be taken from the discussion is: Which approach yields assumptions that most adequately portray reality? This distinction guides one’s argument to be more government-bound or more market-bound.

137. See Ciocchetti, supra note 57.
138. See E. K. Hunt, A Radical Critique of Welfare Economics, in GROWTH, PROFITS, AND PROPERTY 239, 244 (Edward J. Nell ed., 1980), for a discussion about how the market tends to ignore the full costs produced by transactions that involve externalities.

In a market economy any action of one individual or enterprise which induces pleasure or pain to any other individual or enterprise and is un-priced by a market constitutes an externality. Since the vast
majority of productive and consumptive acts are social, i.e., to some degree they involve more than one person, it follows that they will involve externalities.

*Id.* In fact, Hunt sees this problem as inescapably huge; externalities are ubiquitous. *Id.* Thus, to trust that the market will rid society of these inadequacies is essentially to deny the complexity of reality.

But see R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960), who suggests that the problems of externalities would correct themselves when the parties affected agree to negotiate about which transactions will have the overall best effects. For example, Coase supposes that, under ideal conditions, when a market exchange causes a significant external cost on a group of people, the firm producing the negative externality would pay those individuals suffering the social cost (to endure its harm or move) if both the firm and the suffering parties could be better off. *Id.* at 6–17. It is important to recognize here that Coase is speaking about a potential development; he offers no probability estimate of the likelihood that such harmonious negotiations would take place.

Coase’s theory relies fundamentally on the confluence of several conditions. For one, individuals involved and affected by the market exchange causing the externality would have to be able and willing to come to an agreement as to how to deal with the costs. *Id.* at 4–5. For this agreement, all parties would essentially need to agree upon a standard that would determine the fate of the externality. These conditions have some serious obstacles to overcome. First, what reason do we have to believe that the parties would have to agree about a fairness standard? It seems improbable that a firm producing a product that has negative externalities on someone’s home would be able, through discourse, to arrive at a compensatory payment repaying the homeowner for damage to a home that, because of personal or cultural values, the homeowner sees as priceless. In short, for Coase’s argument to have bite, human actors would require a high degree of rationality, perfect information and the ability to overcome deep disagreements. See Robert Fogelin, *The Logic of Deep Disagreements*, 7 Informal Logic, 1, 1–8 (1985), for a discussion about the obduracy of deep disagreements. See also Jules L. Coleman, *Risks and Wrongs*, 15 Harv. J.L. & Pub. Pol’y 637, 642 (1992), whose insight touches on the problem of assuming cooperation will rid society of social costs of transactions.

Markets are important, however, precisely where they are most difficult to create and sustain: under conditions in which individuals have very different values, and where interactions among them are one-dimensional and non-repeating. Market transactions or exchanges can be viewed as local cooperation problems. Under these conditions, cooperation is difficult. Individuals with vastly different values will have considerable difficulty in determining whether cooperation can be mutually beneficial.

If Coase’s presumptions (similar to those of the perfectly competitive market) were consistent with true market conditions, perhaps his alleged solution to social costs could be achieved. However, if reality were messier than Coase’s
that external costs are borne neither by the buyer or seller, by definition; yet these are the only two groups that have voice in the price determination process. When market price reflects only part of the benefits or costs associated with the creation of a good or service, the resulting price creates a scenario in which the benefits or costs that are actually received by parties not in the exchange are not fully paid for.\textsuperscript{139}

See also Donald H. Regan, \textit{The Problem of Social Cost Revisited}, 15 J.L. \& ECON. 427 (1972), for a critique of the validity of Coase’s theory. For example, Regan notes the extraordinary assumptions that Coase relies on.

The first thing to observe about this argument is that, like Coase’s original argument, it assumes successful bargaining and therefore assumes the truth of the Coase Theorem, at least in a limited context. We are offered no explicit model of the process by which appropriate firms are created. It is simply asserted that in a world of perfect information and zero transaction costs, the right organization of the economy into firms would appear.

\textit{Id.} at 435. Thus, Coase’s theory essentially relies on presumptions about the world that need not necessarily be consistent with the actual world we live in. Regan also points out the ambiguity of “rationality” which underlies Coase’s theory.

In varying contexts the rational man has been taken to be (\textit{inter alios}): one who maximizes utility (or profit) in the face of given prices and economic conditions; one who maximizes expected utility (or profit) in the face of risk; or one who adopts a maximin strategy if he is playing a two-person constant-sum game. All of these are standard meanings of “rational” . . . . \textit{Id.} at 429.

\textsuperscript{139} See Garrett Hardine, \textit{The Tragedy of the Commons}, in \textit{PHILOSOPHY AND CONTEMPORARY ISSUES} 262, 266–68 (John R. Burr \& Milton Goldinger eds., 5th ed. 1988). Hardin argues that “the tragedy of the commons” is essentially that every rational being has an incentive to produce without limits, even though that production may reflect negative social effects. \textit{Id.} Hardin expresses the benefits and costs of this phenomena in units of utility, using his cattle and herdsman example.

The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1 . . . . The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of -1.
Closely related to the disharmonizing effects of externalities on markets, public goods can also disrupt the market mechanism from achieving socially desired prices. The effects of public goods can be best understood by reference to the free-rider problem.\textsuperscript{140} We start with a hypothetical market exchange, where a trade results in gains for the parties involved.\textsuperscript{141} In this ideal market, the value that the parties involved place on the good being traded is represented by price; thus, in theory, price adequately reflects the benefits gained by the parties involved in the exchange.\textsuperscript{142} The free-rider problem occurs when those benefits represented by the market price leak onto individuals not involved in the exchange, i.e. free riders.\textsuperscript{143} The effect of free riders in markets causes the total benefit produced in a market exchange to not be accounted for; thus, market prices tend to be understated. Consequentially, if market prices cannot properly value social worth of goods, then the market loses its legitimacy to provide optimal prices for all consumers, and subsequently, to reach allocatively efficient production outcomes.

A final assumption that needs to be considered before appealing to the positive attributes of the market is that of evenly distributed power among firms in the respective market one is talking about. In other words, the market cannot be

\textit{Id.} at 266. Hardin also presents his argument in terms of pollution (the negative external effects of putting entities into the commons, rather than taking them out). \textit{Id.} According to the same valuation procedure of benefits and costs, it would seem that rational individuals have an incentive to ignore externalities: “The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them.” \textit{Id.} at 268. Thus, individuals have incentives to ignore externalities.


141. \textit{Id.}

142. \textit{Id.}

143. \textit{See Frank & Bernanke, supra} note 8, at 68–69, where Frank and Bernanke explain the relevance of public goods and services to market failures. The textbook notes that public goods are necessarily goods whose benefits are not exclusive to the parties that pay for the good. \textit{Id.} Thus, naturally, once the good is bought, outside parties look to reap its benefits without charge. Because, the nature of public goods entails individuals leeching on to the goods of others, public goods tend to be under produced. The resultant quantity produced is hardly ever close to the socially desirable quantity of public goods.
trusted to adequately set prices in situations where some sellers violate competitive market structural conditions such that they possess an ability to charge a price greater than the cost of production.\textsuperscript{144} Significant market power allows firms to distort the automaticity that advocates of the market predict. Further, as soon as one firm gains market power, the inherent rational self-interest that supposedly leads firms to meet consumer needs ends up guiding firms to pay more attention to profit.\textsuperscript{145} Profit levels above the profits possible in a competitive market serve as an incentive for a misallocation of resources. The power of these firms enables them to ignore consumer sovereignty in the same sense as that concept is used in a purely competitive market. As a result, the ethos of the market shifts from meeting consumer

\textsuperscript{144} See Blumstein, \textit{supra} note 10, at 98 (advocating that positive economic analysis of power relations in markets is the only way to determine the applicability of anti-trust law, specifically in the healthcare market: “Given the normative importance of the application of the antitrust laws to the healthcare environment, one could reasonably predict that there would be conflict regarding empirical issues that undergird the application of the antitrust laws to any industry. For example, conventional antitrust doctrine requires the use of empirical analysis to determine such issues as the existence or nonexistence of market power—the ability of an economic actor or set of actors to influence price or quantity in a market. Similarly, empirical evidence will often be sought regarding the competitive effects of various restraints in a particular market.

That inquiry is necessary in a traditional rule-of-reason analysis to determine whether, on balance, a particular restraint is procompetitive or anticompetitive.”). Blumstein highlights the importance that market conditions have on the determination of certain policies. Blumstein puts it quite simply: “[E]mpirical evidence should inform antitrust analysis . . . .” \textit{Id.} at 117. Thus, in accordance with the message of this paper, if court decisions and legal scholars fail to recognize the underlying variables that form the market, it would follow that an adequate solution to a problem affecting the market could not be found. \textit{See generally} Myron C. Grauer, \textit{Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model}, 82 MICH. L. REV. 1 (1983) (highlighting the importance of market structure in the application of anti-trust law).

\textsuperscript{145} See Richard A. Posner, \textit{A Failure of Capitalism: The Crisis of ’08 and the Descent into Depression} (2009), for a discussion on the profit-maximizing duty to shareholders that commercial banks gave up by trying to compete with the more highly-leveraged investment banks. Within such a market, firms’ incentive of profit maximization was exploited at the expense of the ethical considerations of individuals who invested their savings with these financial institutions.
needs to that of making the most revenue because the firm’s internal organizational needs can now be achieved.

The key understanding to be gleaned from this presentation of alternative market structures is the rich potential implicit in the idea of the market. As a community, we can structure the law such that one group or another benefits. 146 Even if we were to reject the consumer perspective implicit in the capitalist theory and the history of our antitrust laws and regulatory agencies, we would still have to somehow respond to the democratic ethos implicit in identifying with that consumer perspective.

One primary norm of economic performance that we demand from our market system is efficiency: the maximization of output in response to a particular set of inputs. Consumers would like to get as much for their money as they can. With respect to this performance criterion, competitive markets excel.147 The consumers who save income because they pay less than the good is worth to them can use this part of income to consume other

146. See, e.g., Lauretta Higgins Wolfson, State Regulations of Health Facility Planning: The Economic Theory and Political Reality of Certificates of Need, 4 DePaul J. Health Care L. 261, 262–63 (2001). The author recognizes that the health care industry does not mesh well with the simple and ideal model of supply and demand. Id. at 263. The development of certificates of need is studied as a potential response to apparent market failures. Id. at 266. Such an analysis implies an understanding of variant market structures and provides an illustration of how laws and regulations can allocate resources in ways that markets, by themselves, generally do not.

147. The technical way of saying the same thing is to say that competition maximizes consumer surplus. See F. M. Scherer & David Ross, Industrial Market Structure and Economic Performance 23–27 (3d ed. 1990). Consumer surplus occurs when consumers receive more value by consuming a good than the money value they must pay sellers for the good. Selling firms face a downward-sloping demand curve. Some consumers value the good more than other consumers and are therefore willing to pay more than others. But in a competitive market every firm receives only the market price because of its status as a price-taker. Although some consumers might be willing to pay more than the market price, they are happily paying the (lower) market price. The firms cannot skim off the money that some buyers are willing to pay. The absolute size of the consumer surplus depends on the elasticity of the consumers’ demand curve. For example, if the demand curve has a low price elasticity of demand, then the consumer surplus is large. See Shepherd, supra note 140, at 36.
Yet another inefficiency associated with noncompetitive markets is the effect of a less-than-competitive market structure on costs. Competitive firms feel intense pressure to minimize costs, but the economic profits enjoyed by noncompetitive firms permit a more relaxed approach to costs. Internal inefficiency, or X-inefficiency, occurs when cost-control by firm management becomes lax. Therefore, actual costs are permitted to exceed minimum costs. While X-inefficiency is difficult to measure, it is more likely to be reduced under competitive pressure than in a monopolistic market.

Non-competitive firms also increase their costs of operation and, subsequently, their inefficiency by the attempt to gain, extend, and defend monopoly positions. In other words, their greed is inconsistent with the productive role that greed plays for firms in the competitive market. Such firms may devote a lot of money to excessive advertising and similar product differentiation efforts. The consumer is benefiting from a certain

148. This saved income is lost when a non-competitive firm charges a higher price for the same output. This welfare loss is called the "welfare triangle" or "dead weight welfare loss." Price Floors, ECONOMICS.FUNDAMENTALFINANCE.COM. http://economics.fundamentalfinance.com/micro_price_floor.php (last visited Feb. 26, 2012). The size of the welfare loss depends, like the consumer surplus, on the elasticity of the demand curve. Id. It is larger when the demand curve is more inelastic and smaller when the demand curve is more elastic. See SHEPHERD, supra note 140, at 44, where this "misallocation burden" is discussed. Estimates for the dead-weight welfare loss attributable to monopolistic resource misallocation in the United States lie between 0.5 to 2% of gross national product. See SCHERER & ROSS, supra note 146, at 662–67, where the authors give an overview of different studies trying to find an appropriate estimator for the welfare loss.


150. See id. for the most complete exposition of the causes and effects of X-inefficiency. To measure X-inefficiency we need insider information about the firm. Insider information is usually available only after management of the firm has changed.

151. X-inefficiency is closely related to market power. Not every monopoly is developing X-inefficiency, but many do. See SHEPHERD, supra note 140, at 106–07 (illustrating the cost cuts of several U.S. firms like IBM, AT&T, and General Motors since the early 1980s, when the firms experienced more competition). Estimates for X-inefficiency attributable to monopoly suggest that those costs are at least as large as the welfare losses from resource misallocation. Id.
amount of advertisement, where he or she is getting more information about new products, quality, or price of a good. This informative advertising improves choices for the consumers and contributes to their welfare. The benefits turn to costs, however, when the advertisements are used only to change consumer’s preferences away from the mere goods or services that consumer sovereignty would otherwise yield.\textsuperscript{152}

Social institutions, such as the law or the market, are as valuable as the contribution they make in relation to their options. For instance, the primary options to business law are: (1) a Hobbesian system of all against all\textsuperscript{153} and (2) governmental hegemony with its high risk of abuse.\textsuperscript{154} Compared to these options, ethical reasoning grounded in law naturally attracts our best talents and energies.

In a society where resources never seem adequate to meet more than a few of the purposes for which we would like to use them, we must decide a huge array of complex issues:

- What to produce and consequently what not to produce;
- The prices and quality of the eventual output;
- Who will receive what is produced;
- Who will do the production; and
- How those producers will be compensated.

Markets can address these problems in numerous ways with diverse results. The distribution of wealth and income, the social traditions with respect to regulatory control of market decisions, national cultural norms, and the dominant form of markets are just a few of the factors that result in market outcomes. Change any of those variables and the prices, incomes, and product mix

\textsuperscript{152} To these expenditures for advertisement must be added the amount spent on personal sales calls unsolicited by buyers, unnecessary packaging, and styling changes in last year’s models. See SHEPHERD, supra note 140, at 112, for the evidence that roughly fifty percent of all advertising is functionless and therefore representing economic loss.

\textsuperscript{153} See, e.g., GREGORY S. KAVKA, HOBESIAN MORAL AND POLITICAL THEORY 92 (1986).

\textsuperscript{154} Andrew Beattie, How Governments Influence Markets, INVESTOPEDIA (Mar. 9, 2011), http://www.investopedia.com/articles/economics/11/how-governments-influence-markets.asp#axzz1gEtL1NID.
become markedly different from what they otherwise would have been. So to voice loyalty to the market is to start a

155. Tweaking the listed variables in different ways results in an innumerable amount of different types of markets.

See Coase, supra note 19, at 715–17, for an example of an answer to “what to produce and consequently what not to produce?”. Coase, just like most economics authors, acknowledges the most basic answer to the previous question: “[A] competitive economic system coordinated by prices would lead to the production of goods and services which consumers valued most highly.” Id. As discussed in this Article, however, the assumptions of the competitive market are tenuous and often not consistent with reality. Thus, the previous answer to “what to produce?” only gives one facet of the many different answers that can come about in different market contexts. For example, the question “do firms consider the costs of externalities when they produce?” has several different implications for what is produced. If externalities are accounted for, then firms would have a social incentive to either increase or decrease production. However, if externalities were ignored because of the incentive to maximize profits, then current production processes might stay unchanged, and not truly produce the socially optimal amount of goods.

See generally Benjamin Klein & Keith B. Leffler, The Role of Market Forces in Assuring Contractual Performance, 89 J. Pol. Econ. 615 (1981), for an example of an answer to “what the prices and quality of the eventual output should be?”. Klein gives an archetypal description of how the competitive market should function; specifically, in relation to how the responsiveness of price to consumer demand assures the high quality of goods and service in market exchanges. The argument presented, however, is plagued with a plethora of assumptions that seem to counter any possibility of the alleged market mechanisms being actualized in any market other than that of the perfectly competitive market. For example, the authors “assume that the identity of firms is known by consumers and that the government enforces property rights to the extent that consumers voluntarily choose whom to deal with and must pay for the goods they receive.” Id. at 617 (internal citations omitted). The authors’ assumptions lead to market forces yielding “quality-assuring prices,” because consumers would not voluntarily buy from sellers who are deceptive or sell low-quality products: “Because of such rational consumer anticipations, firms will not be able to cheat, but desired high quality output will not be supplied.” Id. at 621. This logic eventually leads advertising investments to be positive indicators of quality and performance. At one point, the authors note that their optimal market design is theoretical and thus propose that it should be aimed at rather than realized. But, if the structural variables veered significantly from those assumed in this study (for example consumers not being so rational) could one ever really expect the same degree of fairness that this market so wonderfully achieves? See, e.g., Gerard J. Tellis & Birger Wernerfelt, Competitive Price and Quality Under Asymmetric Information, 6 Marketing Sci. 240 (1987) (studying the effect that asymmetric information has on price and quality). Generally, the ability for market prices to adequately account for the quality of goods depends on the product information available to consumers. Consequentially, if the assumption of
conversation. The first inquiry in that conversation must be “which market is that?”.

A shorthand way to make this point about the ambiguity of allegiance to market institutions is to remind ourselves of the history of that allegiance. Excitement about the promise of markets emerged from disappointment over the abuse of power by its primary option, government in some form or another. Just as business law is an attractive alternative to its options, some markets are clearly preferable to some legislative, judicial, and

perfect information fails, then “the market” mechanism cannot be fully trusted to ensure adequate prices nor optimal quality.

See Coase, supra note 19, at 716, for an example of an answer to “who will receive what is produced?” In his article, Coase describes the market transaction process, as would be viewed by Adam Smith: “A person wishing to buy something in a barter system has to find someone who has this product for sale but who also wants some of the goods possessed by the potential buyer. Similarly, a person wishing to sell something has to find someone who both wants what he has to offer and also possesses something that the potential seller wants.” Id. Thus, with respect to the initial question, consumers who are both willing and able to exchange something for the good they want will receive that good. However, this view of trade was posed in a time in history where markets were just beginning, and they were for the most part, small-scale, decentralized markets, which are desirable for consumer sovereignty. Today, however, exchanges are not so simple, and certainly not as honest. The determination of who receives what is produced depends on a variety of factors including what information consumers have about goods and services, whether a firm has an abundant amount of market power with which to price discriminate against consumers, how much income consumers have, and whether products produce externalities that can affect individuals not involved in the trade. In other words, the willingness and ability to buy a good is only one facet of who receives what is produced.

See R. H. Coase, The Nature of the Firm, 4 ECONOMICA 386 (1937), for an example of an answer to “who will do the production?” In a competitive market, the decision of what gets produced is in the hands of the firms. This allocation to firms is underlied by an efficiency argument: “[T]he operation of a market costs something and by forming an organisation and allowing some authority (an entrepreneur) to direct the resources, certain marketing costs are saved.” Id. at 392 (internal quotation marks omitted). Simply, in the competitive market, firms deciding what gets produced allows for cost minimization. However, would this variable be managed the same way if an imperfect market prevailed? For example, if there were a monopoly, would it be optimal to allow the firm to decide what gets produced, and subsequently further their ability to eliminate competition? As one can see, market conditions fundamentally rely on what answer one gives to: “Who will do the production?” In certain contexts, perhaps the firm is not the best answer.
executive actions of government for answering the issues enumerated above. The simplest way to analyze the relative merits of markets and government for particular issues is to focus on who possesses power in making the decision.\footnote{\text{156.} See Eric A. Schutz, Markets and Power: The 21st Century Command Economy 22–48 (2001), for an outstanding analysis of the forgotten role of power in mainstream economics. Schutz makes the valuable point that power is a necessity in modern social relations. Hence, the rejection of state power simply serves by default to legitimize corporate power. Notice that consumers are not powerless in their interactions with corporations; they are just tremendously disadvantaged because of their massively restricted time, limited knowledge of the process of opposition, and relatively miniscule financial resources.}

From our cultural perspective, the presumption rests with the method of decision making that most respects the kind of shared power we associate with democracy.\footnote{\text{157.} Id. at 4–6. As Shutz explains, power comes in several forms, but it is “domination” that is the most problematic form because it involves the imposition of the will of the person with power. \textit{Id}. This imposition has no basis for social respect because it denies the basic humanity of the other person.} However, only the competitive market with its powerless sellers provides the kind of shared power commonly associated with democracy. Hence, it is not surprising that those who cite the wonders of markets do so by referencing by inference only those market arrangements that resemble the family farm or the mom and pop grocery store.\footnote{\text{158.} See, e.g., Adams v. Watson, 10 F.3d 915 (1st Cir. 1993). Due to an apparent state of emergency in the Massachusetts milk industry, characterized by rising production costs and flat prices, the Massachusetts State Commissioner of Agriculture instituted a price stabilization system. \textit{Id}. The system essentially set the price of milk at fifteen dollar per hundredweight and forced all milk distributors in Massachusetts to pay one-third the amount of however much the fifteen dollar minimum price exceeded the federal minimum blended price for that month. \textit{Id}. The revenues collected were then paid out to Massachusetts milk producers in proportion to their share of the state milk production. \textit{Id}. Out-of-state distributors are subject to the assessment, but out of state producers are not eligible to receive disbursements from the revenues collected.}

Those kinds of firms have no choice but to be the kinds of responsive servants who can be depended upon to meet the desires of the consumers. Their market power is non-existent, not because they do not seek domination of market outcomes, but because the structure of the market in question does not permit their hegemony. They lack market power, and therein resides
their social legitimacy. However, as has been one of the underlying themes of this Article, arguments should refrain from the depictions of the world that are inconsistent with the actual world in which we live.\textsuperscript{159}

When business law and ethics embrace market outcomes, it is \textit{ipso facto}, whether by intention or not, aligning itself with those who control allocation and distribution decisions. For highly competitive markets, that alignment would be consistent with democratic traditions in that consumers, not business firms, possess the breadth that permits a social cohort to at least be a credible synonym for the people. But when noncompetitive markets dominate the market, legal scholars, by sanctioning market outcomes, join other technical professionals\textsuperscript{160} in unintentionally, but effectively, ignoring the ethical implications of their expertise. Ethics is fundamentally about considering the interests of the other who needs the most consideration in these calculations, is the weaker member of society. Others can fend pretty well for themselves. Those with substantial market power in existing market frameworks understandably prefer to glaze over the substantive differences in the ethical implications of different forms of markets.

\textsuperscript{159} See generally \textsc{Ayn Rand}, \textsc{Anthem} (1961) and \textsc{John Steinbeck}, \textsc{The Grapes of Wrath} (1939), for two conflicting arguments still read across the United States to this day, that use extreme depictions of the world to “strengthen” their arguments. In Rand’s world, government mandates everything and people are essentially in a prison; thus, she praises individualism over collectivism. \textsc{Rand}, supra. In Steinbeck’s world, pure capitalism destroys society by a preserving few large corporations who exploit the poor; thus, he glorifies collective behavior. \textsc{Steinbeck}, \textit{supra}. Before accepting their popular views, however, one should wonder whether the values they are advocating fundamentally rely on the validity of the extreme and surreal conditions that they present to the reader.

\textsuperscript{160} See \textsc{Carl Boggs}, \textsc{Intellectuals and the Crisis of Modernity} 3–4 (Roger S. Gottlieb ed. 1993), for the distinction between critical intellectuals and the technological intellectuals. The latter simply use their knowledge to support the existing pattern of domination and control. \textit{Id.} In other words, Boggs claims, they play the ventriloquist for the powerful.
HOW WEST LAW WAS MADE: THE COMPANY, ITS PRODUCTS, AND ITS PROMOTIONS

Ross E. Davies

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Only in American law is West not primarily a geographical term. When we lawyers think of West we tend to think first of West Publishing Company—the preeminent source of printed law books since before we were born and of electronic law databases in recent years.¹ But despite its importance to the development and dissemination of American law, West itself is a creature most of us do not know much about; we know only its products. That is not our fault, because there is only a little bit of information available, and much of that little bit is hard to find. This Article offers some perspective on the roots of West, the publishing company, and of its primacy (or at least the primacy of its brand) in the consciousness of modern American lawyers.

I. BACKGROUND:
WHAT DO WE KNOW ABOUT WHAT WEST WAS?

There is a chicken-and-egg quality to West’s great and durable success in law publishing. The puzzle—or one-half of it, at least—is captured nicely in Bryan Garner’s capsule history of West’s most famous book, *Black’s Law Dictionary*, which was first published in 1891.

“Home Establishment of the ‘National Reporter System.’ (river front).”

3. Home Establishment of the “National Reporter System”, 1 Cornell L.J.
What happened is that Henry Campbell Black’s dictionary took
the field and became incontestably supreme, partly because of
his comprehensiveness, partly because of his academic stand-
ing, and partly because he had the good fortune of publishing
his work with West Publishing Company.4

A roughly converse set of explanations covers the history of West,
which incorporated as West Publishing Company in 1882.

What happened is that in the late 19th and early 20th cent-
uries, West took over the law publishing field and became inco-
testably supreme, partly because of the comprehensiveness of
its law reports, partly because of its standing as a producer of
quality products, and partly because it had the good fortune of
publishing works such as Black’s Law Dictionary.5

So, what is it going to be? Was West a company that happened
(through some combination of good luck and good judgment) to
pick the best products to make and market? Or was it a company
whose production and marketing made its books bestsellers? (Put
another way, was West successful because of Black’s and other
books, or were Black’s and other books successful because of
West?) This Article concludes that both are true.

It is unlikely that West will ever publish answers to these
questions about its formative years. It has not done so yet, de-
spite having access to an indisputably available and sympathetic
publishing house. Perhaps that is because the institution’s kno-
ledge of its own history is incomplete (there was, for example, a
seemingly messy and unhappy transition from old guard to new
about a century ago, during which access to memories of early
days may have been lost)6, or because there are trade secrets to

99 (1894).

Garner is the current editor-in-chief of Black’s Law Dictionary and (even more
surely than was Black in his own time) the most influential contemporary schol-
lar of American legal language.

5. William W. Marvin, West Publishing Company: Origin, Growth,

Company, 50 Am. J. Legal Hist. 1, 11–12, 19–22 (2010) (quite rightly bemoan-
be protected (which might itself be a secret), or because the organization lacks the exhibitionist impulses that seem so nearly universal nowadays (which it would not want to exhibit), or for some other, even more obscure reason. The company has published one history—William Marvin’s 1969 book, West Publishing Company: Origin, Growth, Leadership. But even Marvin, whose maximal access to company records might reasonably be inferred from his status as worshipful semi-official company historian, was unable to get hold of much primary source material to work with.

The founder, the four original partners, and the incorporators are no longer living and all original records of the earliest days apparently were discarded years ago, as the business expanded at a rate that made all available space too valuable to retain mere historical papers. Descendants of the founders are widely scattered throughout the country and while some information has been obtained from them in the form of recollections and comments from their forebears none seems to have retained, if in fact they ever did possess, written or printed records of the early days.

A few resourceful modern scholars—notably Robert C. Berring, Robert M. Jarvis, and Thomas Woxland—have done an admirable job of unearthing and analyzing what can be found. Their studies have shown, among other things, that West—led by John B. West thoughout the company’s rise in the late nineteenth century and into the early twentieth century—was unique in its commitment to comprehensive publication of all available law (for example, regional and federal case reporter series) along with systems designed to enable lawyers to speedily search and

7. MARVIN, supra note 5.
8. What else can be said of the relationship between an author who writes and a company that publishes, “the main factor that resulted in such exceptional uninterrupted success and growth was top management”? See id. at 2.
9. Id. at 23–24.
sift those vast volumes of legal data (for example, the Key Number system). In contrast, West’s nineteenth century competitors tended to favor limiting full publication to the most important and useful law (to be supplemented by specialty digests and other secondary resources), with law publishers (of course) deciding what law was important enough to merit full publication.

American lawyers, it seems, preferred to decide for themselves which law was most important and most useful, and so they gravitated to West’s products. West, like Black, made the right comprehensive call when it went through the trouble and expense of putting everything into its standard products, because it turned out that nineteenth century American lawyers—like modern American lawyers—wanted it all and they wanted it now.

All of which suggests that the Black-West parallel drawn above holds. The work of Berring et al. indicates that the answer to the first of the two questions asked above—“Was West a company that happened (through some combination of good luck and good judgment) to pick the best products to make and market?”—is yes. John B. West’s definitive statement in 1889 of his company’s plans and ambitions—

It is one of the greatest merits of the National [Reporter] System that it gives all the cases. Some of our critics [that is, the other law publishers] call it the “Blanket System,” and we are disposed to accept the analogy. No policy of insurance is so satisfactory as the blanket policy; and that is the sort of policy we issue for the lawyer seeking insurance against the loss of his case through ignorance of the law as set forth in the decisions of the highest courts.

11. See Berring, supra note 10, at 186; Jarvis, supra note 6, at 8; Woxland, supra note 10, at 118–20.
13. See, e.g., Robert C. Berring, Full-Text Databases and Legal Research: Backing Into the Future, 1 High Tech. L.J. 27, 31 (1986); Jarvis, supra note 6, at 1; Woxland, supra note 10, at 115.
—and the results of those plans (the reporter and Key systems, the comprehensive panoply of related products, the consistent and dominating commercial success of West over the decades) speak affirmatively for themselves.

II. FOREGROUND: WHAT DID WEST SAY ABOUT WHAT WEST WAS?

But what about the second question—“Or was it a company whose production and marketing made its books bestsellers?” That is perhaps a harder one for a modern observer to answer definitively. After all, the best sources of information—the people who made and sold those products (West’s employees and agents) and the records of their work (the records that William Marvin says “were discarded years ago”)—are all literally dead or gone.

There are, however, at least two other sources—one obscure, one in plain sight—that suggest West itself viewed its production and marketing capacities as valuable not only in their own right, but also as features worthy of promotion to their customers.

The first, obscure source is a promotional pamphlet titled Law Books by the Million: An Account of the Largest Law-Book House in the World, the Home Establishment of the National Reporter System and The American Digest System. It was published and distributed by the West Publishing Company in 1901, but has since all but disappeared from the shelves of law libraries. It is reprinted in its entirety below in Appendix A from pages 248–75. Law Books by the Million is not the only pamph-

Comprehensiveness, one might say, is not just a feature of American law publishing, it is a persistent underlying value in American law.

16. MARVIN, supra note 5, at 23.


let-portrait ever put out by West,19 but it is the best, especially for purposes of understanding the business West was in and how that business was conducted during the company’s conquest of law publishing. Law Books by the Million provides a readable, charmingly enthusiastic, and richly detailed and illustrated narrative of the processes West used to create and disseminate its products in the late 19th and early 20th centuries—that is, during in the early years of those simultaneously democratizing and costly, mutually reinforcing revolutions in American law: the expansion of the bar and the legal information explosion.20

The second, obvious source is West’s early advertisements and promotional items. The record of its early years survives only in exemplary fragments, but those fragments are links to West’s ongoing, ever-diversifying marketing campaign.

Back in the early twentieth century, when Law Books by the Million was released, not everyone was happy about the availability of millions of law books, or about publishers’ promotion of their numerous products. For example, in a March 1902 speech sponsored by the Law Association of Philadelphia, Pennsylvania Supreme Court Chief Justice James T. Mitchell rosily recalled the legal culture of his youth:

Law books then were not mere merchandise. The legal world had not yet surrendered to the manufacturer and the bookmaker, nor would any publisher have dared, even if he could truthfully do so, to send out, as more than one does now, boasting circulars that he makes law books by the million. Books were written by men who had a call to write, and who sought in that way to pay their debt to their profession.21


Advertisements in 1 The Syllabi, Oct. 21, 1876, at 1& 7.

As we know with hindsight, though, in 1902 it was already too late, thank goodness, to return to a world in which only the right sorts of people were practicing law and writing law books that were generally inaccessible to the hoi polloi.\textsuperscript{22} Indeed, by the time Chief Justice Mitchell gave his speech, the revolution had been gathering steam for at least a generation.\textsuperscript{23} And for most of that time, West had been in the business of marketing itself. In fact, much of even the first issue (in October 1876) of West’s first regular publication, \textit{The Syllabi}, consisted of advertising for a variety of products sold by West, from books to seals to advertising space.\textsuperscript{24}

West’s marketing program eventually expanded to include nifty, informative pamphlets. The first shorter version of what would become \textit{Law Books by the Million} was published in 1893 under the title \textit{A Description of the Home Establishment of the National Reporter System, with some account of the business of the West Publishing Company}.\textsuperscript{25} It received a friendly notice of its

\footnotesize
\begin{enumerate}
\item[22.] Compare, e.g., \textit{id.}, with \textsc{Barbara Babcock, Woman Lawyer: The Trials of Clara Foltz} (2011).
\item[23.] See Berring, supra note 14, at 31 n.19 (“The literature bemoaning the volume of published cases is vast. A personal favorite is High, \textit{What Shall Be Done with the Reports}, 16 AM. L. REV. 435 (1882).”).
\item[24.] In a nod to its own legacy, West did republish the entire six-month run of \textit{The Syllabi} in 1991.
\item[25.] See \textsc{West Publishing Co., A Description of the Home Establishment System with Some Account of the Business of the West Publishing Company}
\end{enumerate}
own in *Publishers’ Weekly*, as well as the kind of compliment clumsy or lazy editors sometimes pay to work they like: the *Cornell Law Journal* published a large chunk of the pamphlet (without attribution) in its inaugural issue in June 1894.

By 1901, if not earlier, West was distributing its promotional materials with the savvy diversification of a modern direct marketer. *Law Books by the Million* was available both as a free-standing booklet attractively bound in gray cardboard with the words “Where Law Books are Made” embossed in silver on the front cover (that is the version held by the Library of Congress),

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and as an “insert in: Northwestern reporter. Vol. 87, no. 8 (Sept. 28, 1901)” that is the version in the law library at Washington & Lee University. The story of West told in *Law Books by the Million* emphasized the care with which each book was made, the speed and accuracy of its order processing, and the skill and professionalism (and quality of life) of the people who performed that work. The pamphlet was, essentially, an effort to sell West books by selling customers on the processes and people by which those books were made and distributed.

Then, as now, West did have plenty of competition, of course, including other clever marketers. The Edward Thompson Company was probably the most clever. In the 1890’s, Thompson was placing unusually entertaining cartoon advertisements in law magazines. And, in what surely must qualify as one of the most entertaining law book promotions of all time, Thompson commissioned the “Pleading and Practice Grand March” to promote its *Encyclopædia of Pleading and Practice*. The sheet music was arranged by composer George Bishop for performance on a parlor piano (making it easy for lawyers to enjoy at home) and wrapped in a handsome cover featuring a parade of law books in which Thompson’s *Encyclopædia* rides in front in magnificent carriage. The march is reprinted in its entirety below in Appendix B at pages 276–81.

West did not limit itself to advertising and pamphleteering. It was an early user of surveys sent to prospective customers to build interest and patronage. See, for example, the postcard re-

29. See id.
30. See infra Appendix A.
produced on page 242 (which must have been distributed in late 1905 or early 1906), inviting law students to vote for or against an “honor system” for exam administration. The results of the balloting were not, as promised, “published in the Spring issue of the American Law School Review,” although a collection of comments by leading law teachers about honor codes was.\textsuperscript{34}

Furthermore, West plainly discovered long ago a fundamental marketing truth that it continues to act on today: customers like knickknacks. In days of yore, the company passed out goodies ranging from desktop thermometers (pictured on page 241), to bridge playing card sets packaged in miniature volumes of the United States Code Annotated (pictured on page 243), to paperweights crafted to look like medallions with Chief Justice John Marshall’s profile on one side and the West Key Number System key on the other, pictured on page 244. (Was it some West employee or contractor with a sense of humor who selected Redi-lip® brand playing cards to go in the mini-USCAs?).

\textsuperscript{34} See Should the “Honor System” be Adopted in American Law Schools?, 1 AM. L. SCH. REV. 369 (1902–1906).
A QUESTION FOR LAW STUDENTS

The Honor System

At the meeting of the American Bar Association held at Narragansett Pier in August, 1905, the President of the Association, Hon. Henry St. George Tucker, closed his address with a strong appeal for the adoption of the "Honor System" in conducting examinations in all American law schools. Mr. Tucker said:

"It is a system by which the young man at the very beginning of his legal education is brought to realize that in the crucial test to which he is subjected by examination for graduation he is not to be watched as a suspect or guarded as a felon, but he is to be allowed to work out his own salvation and his own examination with a simple reliance by those in authority on his pledged honor, that it will be done without assistance from any source. If at the very threshold of his professional education and all through it, for three years, he realizes that a system of espionage is necessary to keep him from doing wrong, and that adopting the Spartan idea he may be guilty of any theft, if only he

omits the sin of detection, what must be the effect upon him when the system is withdrawn and he is hurled into the broad fields of his professional life, with no one there to watch him in his dealings with his client and with no eye upon him except the eye that never slumbers nor sleeps?"

By some it is claimed that in schools where the "Honor System" has been adopted it has worked like a charm in creating a manly sentiment of honor and integrity and a corresponding scorn of chicanery and deception, not only during the period of examination, but in all the paths of college life, and while occasionally some are found to violate its rules, they are, under the system, summarily dealt with by the student body without the aid of, or even consultation with, the faculty, and are thereby compelled to leave the institution in disgrace, while their punishment and their example tend to deter others who may be weak.

There are always two sides to every question, and some law school professors do not believe that the substitution of student control of examinations for faculty control would prove a success.

What is the opinion of the law student himself on this question?

To Law Students

Students in all law schools are urged to express their opinions in the form of a vote on the following question:

Would the "Honor System" in connection with conducting examinations prove successful in your school, or, if it is now in effect, is it a success?

<table>
<thead>
<tr>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
</table>

Signed by

Name of School

The results of the vote will be published in the Spring issue of the American Law School Review.

(Please detach and mail this Card)
West Words, Ho!
And so, surely, from the point of view of West itself during its formative years—in the eyes of the people who appeared in and published *Law Books by the Million*, and created and distributed all those paperweights and playing cards—the answer to the second question—“Or was it a company whose production and marketing made its books bestsellers?”—is the same as the answer to the first: Yes.

III. MERCHANDIZING MATERIAL

Roughly a century later, environmentally friendly biodegradable “Westlaw Next” travel mugs are the promotional treasure du jour—as legions of law students, practitioners, public servants, professors, and members of other West constituencies know from recent personal experience.35 There is probably a book’s worth of history, entertainment, and wisdom in a full collection of 100-plus years' worth of West Publishing Company tchotchkes. It remains as true today as it was when Edward Thompson was commissioning “Pleading and Practice Grand March” that West has vigorous and creative competitors. These days, Lexis-Nexis is surely the strongest, at least in the on-line law business, and so it should come as no surprise that West recently used cupcakes

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(pictured on page 247) to market Westlaw Next, while Lexis-Nexis has been known to deploy cookies (pictured on page 247) to promote its products.\footnote{36}

Despite its acquisition by a larger corporate entity in 1996, West’s promotional flare persisted, obviously undimmed. Consider, for example, the West-ern style announcement in January 2000 on its Westlaw website of the online availability of the laws of the United Kingdom:

This royal throne of kings, this sceptered isle,
This earth of majesty, this seat of Mars,
This other Eden, demi-paradise,
This realm of laws computerize(-d)

Well, we can’t all be Shakespeare. But now we can all access the laws of the United Kingdom on Westlaw. Access the United Kingdom Law Reports database UKL-RPTS for official transcripts of judgments from United Kingdom courts.\footnote{37}


\footnote{37. Compare Westlaw, www.westlaw.com (Jan. 10, 2000) (statement on website’s welcome window), \textit{with William Shakespeare, King Richard II}, act 2. As all good lawyers know, little new work in the law is ever entirely new, and so it may be that West was inspired by the earlier work of an old competitor, the Bancroft Whitney Company. Here is the story, as told by Professor Richard Sloane:

An Oakland, California lawyer wrote to the Bancroft Whitney Company on receipt of their new California Code for Civil Procedure:

‘Press on the work, in evolution,
Till th’ annotated Constitution
Stands forth beside the four fine Codes—
And then I’ll write you no more odes.’

—Wm. R. Davis.

Bancroft Whitney was touched and assigned its resident poet to reply:

‘We just received your timely ode,
As you received the Pom’roy Code
At first we thought it rather rash,
Until we saw your check for cash.
The Civil Code will soon appear,
And then the Penal ends this year,
Except with Notes the Constitution
Will end just now the evolution.'}
Or picture, if you will, what happens when someone visits the West corporate website (west.thomson.com) today, and searches the site for "stress toys." Click on the links, it's fun.\footnote{Stress Toy, WESTLAW, west.thomson.com/westlaw/advantage/stress-toy/demo1.aspx (last visited May 18, 2011); Stress Tax in Paradise, WESTLAW, west.thomson.com/westlaw/advantage/stress-toy/demo2.aspx (last visited May 18, 2011).}

From The Syllabi to stress toys, with Law Books by the Million and its ilk somewhere in between, West's long program of self-promotion symbolizes and, to some extent explains, the evolution of the law-book publishing business and its relationship to the bar. The same up-to-the-minute website that features the Stress Toys Videos also boasts, in an echo of Law Books by the Million that is also a reminder of what matters most to a company that has been producing law books for more than 130 years, "West annually publishes more than 66 million legal books and 500 CD libraries."\footnote{About Us, WESTLAW, west.thomson.com/about/default.aspx (last visited May 18, 2011).}

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F.P.S.


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But later on when laws are fixed
In places that are not so mixed,
The Code Political, without flaws,
Completes the work with General Laws.'

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The cupcakes pictured above were frosted orange and white—the theme colors of Westlaw Next—before they were eaten by the author and his colleagues in the faculty lounge at the George Mason University School of Law earlier this year. The cookies that were in the Lexis-Nexis box pictured at right were eaten by a food reviewer. The fact that he ate all of them might be an indication of the success of the promotion.
APPENDIX A

LAW BOOKS BY THE MILLION (WEST 1901)

AN ACCOUNT OF THE LARGEST
LAW-BOOK HOUSE IN THE WORLD,—
THE HOME ESTABLISHMENT
OF THE NATIONAL REPORTER SYSTEM
AND THE AMERICAN DIGEST SYSTEM

West Publishing Co.

The West Publishing Co. presents its compliments
to the members of the Bench and Bar of America,
and extends to them all a hearty invitation to visit
its building and offices, in St. Paul.

A trip through the building always proves to be an unexpected revelation of the magnitude and of the interesting character of the business which is carried on in the home establishment of the National Reporter System. This business is one which the New York Nation declares “makes St. Paul, for at least one purpose, the intellectual center of the United States.” It is the business of applying the most advanced methods of law publishing, on the most extensive scale, to the body of judicial decisions which is of the greatest practical importance to the active part of the legal profession of the country.

If you, to whom this booklet is addressed, come to St. Paul, we shall be very glad to see you, and to take you through the building. In the meantime, these pictures will serve to give you an idea of what we would have to show. Perhaps they may induce you to come! It is incidentally interesting to see how it comes about that a Western house should be at the head of the law publishing business, not only of this country, but of the world.
The West Publishing Co.'s building is built, not upon a hill, but upon the side of a hill. It is an advantageous position for a manufacturing establishment carrying hundreds of tons of heavy machinery above its foundations, but it does not make as impressive a building from the front as it would if all of its nine stories were above the street level. This modesty prepares a surprise for the visitor, who finds himself descending and still descending, to floor below floor, all lit with floods of strong southern sunshine, whereas logically (i.e. from the logic of the Third Street entrance)
they ought to be plunged in underground darkness. This arrangement is of great advantage in the matter of light for the storage rooms and it brings the general offices and sales-rooms (which are necessarily placed above the departments operating heavy machinery, and which are actually on the sixth floor) to the street floor in front; while the furnace room, requiring car-loads of coal, and the storage-rooms, taking in carloads of paper and stereotype metal, are easily accessible from the railroad tracks in the back yard.

If the visitor begins his tour by taking the elevator to the top of the building, he will be led first to the proof-reading department, which occupies the entire ninth story. This is a superimposed story, not seen from the street, known to the jovial occupants as the “Roof Garden.” Here there are twenty separate rooms for isolated proof-readers, besides long common rooms in the center for related work. The proof-reading on law books is very much more exacting than ordinary proof-reading. It is done by trained experts, and the minuteness of their scrutiny would be a revelation to the ordinary proof-reader, no less than to the general reader, who takes typographical perfection for granted,—though any one familiar with type knows that more natural de-
pravity inheres in those blocks of metal than in any other inanimate creature known. Every page is read twice, by different readers, trained in familiarity with legal phraseology. The rules regarding the “style” and make-up of the matter make a good-sized volume, but they are a necessary guide in unifying the work of so large a number of individual workers, reading hundreds of pages every day.

The composing room occupies, with the adjoining stereotype room, the entire eighth floor. The spacious room, with its rows after rows of printers’ “cases,” its fonts of perfect type, its orderly lines of expert workmen, and its complete appliances of the latest and most approved sort for handling work expeditiously and to advantage, is a revelation to a man familiar with the ordinary printing office. The compositors are an exceptionally intelligent set of men, dignified and workmanlike in appearance. Bookwork is a different thing from newspaper work, and legal bookwork is of the higher grades of that. Some of the men have been in their present positions fifteen and twenty years,—a fact which has its bearing upon the high standard maintained. The capacity of this department is almost fabulous. The American Digest of 1898 contains 17,000,000 ems, or about 34,000,000 separate letters,—mat-
ter which would fill about 25 volumes, if set like the ordinary State Reports or text books. It would take one average compositor over seven years to set it, but it was handled here in about two weeks, without interruption to other current work. For the year ending Aug. 31, 1900, the output was 254,000,000 ems, which would be the equivalent of from 300 to 400 volumes of ordinary law reports, or say 800 to 900 books of average literary size,—two or three every working day of the year. The combination of tremendous speed with a high grade of work is something that could be attained only in this exceptional sort of an establishment, where each man is an expert and the men are many. The work done sometimes in one day here would keep an ordinary print-shop of ten or fifteen handwork men occupied for a year.

One important element in the attainment of this speed is, of course, the development towards perfection of typesetting machines. These elaborate pieces of mechanism have only within the last few years become practicable, though the dream of them has hung before inventors for over a century. Recent developments have succeeded each other so rapidly that expensive machines which six or eight years ago were the best of their kind, and cost fifteen hundred dollars to two thousand apiece, are today worth the price of old iron only.
The Linotype, of which there are 16 in this room, all in active operation (and during the larger part of the year busy night as well as day), casts lines of “type” in the shape of small metal bars, by means of a little pot of molten metal hidden under its innumerable attachments. If we were to attempt to do by hand composition the work which is here handled by about 30 men with the use of the Linotype, it would require the building of an additional story capable of accommodating 150 workmen.

The processes of stereotyping are among the most picturesque of the printing business. Here are kettles of molten metal, waiting to be turned into “plates” to print from; here are wheels and saws and knives that trim and shape the solid metal as easily as though it were cheese.

A mold of the type-page is made of stereotyper’s paper which is beaten down, wet, into the type form, and then baked hard. From this the metal plate is cast, and from these plates, not from type, the book is printed. After the first printing, the plates are stored away in underground vaults, and preserved for the reprint editions which are constantly called for.
These storage vaults, used exclusively for the preservation of the metal plates, which constitute one of the valuable assets of a great publishing house, are burrowed into the sandstone of the hillside, and, though they open out on the pressroom at their entrance, their course runs 80 feet below the surface of the earth,—five stories down from the front entrance. Here the plates are filed away, page by page, and volume by volume, in exact order, at hand instantly when wanted, yet safe from fire, flood and cyclone. The vaults are nearly a quarter of a mile in length, containing over 2,500,000 pounds of stereo plates, the metal of which is worth at market prices over $150,000, and which represent an original cost for manuscript and composition of over $3,000,000. Only those plates are preserved which are needed for reprinting, and some are always in use to meet the demand for back volumes.
The editorial department is naturally the most interesting to a lawyer, for here he sees the actual process by which “the law as it is” is put within his reach. It occupies the entire seventh floor of the building. Here are the editors, the revisors, the digesters, and the annotators, each of them a lawyer first and an experienced “law-writer” next. To bring together and train this efficient corps has been the work of years; and as a body there is not another to match it. The tests given applicants make it certain that only lawyers of more than average ability, and with special mental aptitude for this class of work, are engaged in this very important position. A lawyer of scholarly tastes and abilities finds a more attractive field in legal literary work than in the competitive struggle which awaits him if he enters the practice, and the rewards, if less dazzling, are more assured.

Instead of being left to follow individual whims and theories, the editors act under an elaborate code of Instructions, which is the outcome of experience in reporting over 275,000 cases. No report is published until it has been carefully examined and revised. The general recognition of the excellence of the editorial work upon the Reporters is amusingly illustrated by some leading law journals, which often adopt, not only the text of the opi-

255
tion from the Reporters, but headnote and statement of fact as well, without taking the precaution to indicate that they were only borrowers, and not sponsors.

The editorial standard, placed high at the beginning, has been constantly advanced, and the question of expense is never considered when the editorial integrity of a piece of work is concerned. The adherence to this policy has justified such comments as the following from the late Thomas G. Shearman of New York City, author of Shearman & Redfield on Negligence: “The American Digest is so far superior to any other digest which has ever been published, either in America or England, as really to admit of no comparison.”

In the digests, the advantage resulting from the uniform methods possible to a corps of co-workers is manifest. The Century Digest, for instance, would not be a possibility on any other basis. It is coming out at the average rate of nearly a volume a month, each volume being equivalent to a digest of one hundred volumes of reports; and the distribution of these hundreds of thousands of digest paragraphs is made according to a scientific and logical classification of the law, which has been carefully worked out down to the smaller subdivisions of the subjects. The “American Digest classification” has been recommended by the American Bar Association for universal adoption by digesters, as the best basis for a uniform classification of the law.

The Century Digest editors are grouped in a room by themselves. The manuscript material, written on slips for easier classifying, is stored till wanted in a fire-proof room in the Annex, where it is in the charge of a corps of clerks, who send to the editors at any time any special section that may be needed. Every assistance is given to the editors in the way of clerks, stenographers, and all sorts of ingenious mechanical appliances.
EDITORIAL ROOM OF THE CENTURY DIGEST.

FIRE-PROOF STORAGE ROOM FOR CENTURY DIGEST MANUSCRIPT.
In this department of assistants are the “verifiers,” who examine every citation to make sure that title, volume, and page are correctly given; the copy preparers, who go over the manuscript to see that they are typographically ready for the printer’s unreasoning acceptance; the record keepers of various sorts, copyists and assistants, acting under the direct orders of the editors,—numbering in all over 150 persons, mostly young women. There is, necessarily, much detail connected with the handling of the opinions preliminary to publication. They come here from all the states in manuscript form,—a form of “report” with which the legal profession was very familiar before the “advance sheets” of the Reports were thought of, and they must be recorded and sent to the editors in turn, and checked at every stage of progress toward the printed report. This department is as thoroughly organized and as fully equipped as any in the building.

The editorial library, which is in constant requisition, is probably one of the most completely equipped reference law libraries in the country. All citations of cases, whether in a decision, note, statement, or elsewhere, are verified before they go out in print by a reference to the original volumes or from carefully compiled tables. Thousands of errors in the manuscripts are
corrected in this way annually. Every lawyer will realize the importance of this work from a memory of time and patience wasted by “miscitations.”

The press-room, where the actual printing is done, is down on one of the lower floors,—a large, airy, and well-lighted room, specially built and fitted up for the accommodations of these busy and heavy machines, which are kept running both day and night during a great part of the year. Here tons of blank paper are taken in, and turned out as printed records of judicial decisions, to affect, directly or indirectly, the personal and property interests of our 76,000,000 persons.
The importance of perfect appliances here is made clear when the pressman explains that carelessness in his department would spoil a piece of work to which every other department might have contributed its best. In fact, from the pressman’s point of view, neither the paper manufacturer, nor the typefounder, nor the printer who sets the type, nor the laborious proof-reader, nor ever the august tribunal which promulgated the opinions, is quite so important a factor in producing the prefect law book at last as the man who sees that the forms “register” all right, and that the ink does not “smooch” or the fresh pages “offset.”

The automatic folders, which take the sheets of paper, each with 32 printed pages on it, from the presses, and fold them exactly and with marvelous rapidity into the “signature” required in the book, are wonderful pieces of mechanical ingenuity. A pile of the printed double sheets from the press is laid upon the table, and the wheels are started. At once a rubber finger, which works with a comical imitation of consciousness doubles up a corner of the top sheet, and pushes it on until it is caught by the revolving belts, and shifted on to be suspended over what looks like the mouth of a small maelstrom of machinery. There it is sucked own
into a tangle of wheels and belts and rods and blunt knives, and what happens to it there no man knows; but when it escapes at last it is not torn to ribbons at all, but the two sheets are separated and neatly folded by four distinct folds, and the 32 pages have found their consecutive arrangement.

Adjoining the press-room is the store-room for the paper. Bales and bundles of paper, and bales and bundles beyond that again. They are brought in here at the rate, on an average, of a carload every five days,—and of course taken out to feed the sturdy appetite of the presses at about the same rate of speed.

Our paper is made specially for us (and has been for nearly twenty years) by one of the largest millers of the country. It is a rag paper,—which means that it is a superior paper. Wood-stock papers, owing to the cheapness, are very commonly used, even in books where one would not expect them; and the processes of manufacture often give them a superficial finish which makes them look as well as rag paper,—at first. But it is impossible to give them the wearing qualities of the more costly rag paper, and the books will unfailingly show the difference in time.
On the lowest floor of all are the boiler and engine rooms. This engine has for years sent the power for machinery to all the manufacturing departments, and now stands waiting to throw itself into the breach if at any time there should be a failure on the part of the electric motors with which the building has been newly fitted. The boilers supply steam to heat all parts of the 3½-acre building, with its many miles of steam pipes.

Turning to reascend, we stop at the bindery on the fourth floor, where we find tables and tables and tables crowded with books indifferent stages of undress. The wire stitchers, "smashers," trimmers, hydraulic presses, etc., are all interesting examples of modern machinery; and watching them in operation makes clear the various processes, from the folding of the sheet to the polishing of the label, by which the printed paper is transformed into the familiar sheepskin-covered volumes. Twelve hundred and seventy-five of these were turned out in one day, recently, as a regular day's work.
Among the remarkable machines here are the sewing machines for books, which take in the folded sheets, and turn out books all sewed, knots tied, ready for the “smasher.” One of these sewing machines will turn out 200 books while an expert hand-sewer turns out 40, and, what is even more important, it does superior work. This is not always the case with the new invention. There is generally some compensating disadvantage in the character of machine work to avenge the hands from which the work has been taken, but in these machine-sewed books the advantages are all on one side. The work is firmer, more durable, and better in every way. Eight threads are used, and they are so interlocked that, even if one section be torn out of the book, the
adjoining sections are not loosened. The advantages of a method of sewing that allow a book to be opened to the full without breaking is manifest in such heavy volumes as the American Digest. Statistics give the poorest sort of an idea of the facts, and it doesn’t mean much to us when we are told that 5,000 to 6,000 sheep resign their skins every month in favor of the National Reporter System. But we are impressed in spite of ourselves when we learn that the waste clippings make a carload for the paper mill every three or four weeks.

It may be properly mentioned here that the books bound in the West Publishing Co. bindery are all bound in solid sheep,—not in skiver. Skiver is sheepskin that has been split and stretched. It costs much less than sheep, and has about one-third the durability of the solid leather. Of late years it has come into surprisingly wide use as a covering for law books, appearing even on books issued by publishers of the highest standing, though it is quite possible that the contracting binder is the responsible person in such cases. It is more than probable that the disrepute which has fallen upon sheep binding in certain localities, leading
to the experimental substitution of canvas and other bindings, is due to the use of skiver. If the books bound in this bindery do not prove durable, that will be evidence of the intrinsic weakness of solid leather. But that evidence has not yet come in.

The mailing room shows the methods by which the advance sheets are distributed to subscribers. There are ten of these separate issues every six days, each to go out without delay to its own constituency. The loads of pamphlets ready for mailing come down in a chute from the bindery above, and the mailing clerks at a long table stamp the subscribers’ names and addresses on them from long strips of printed names which might almost serve as an attorneys’ directory of the United States. Then they are wrapped and dropped into the waiting pouches of one of the regulation mail racks furnished by the postoffice. This rack holds one or more mailbags for each state. They are locked and forwarded directly to the United States mail cars, and by this means the delay of sorting them at the postoffice is avoided, and several hours gained in their distribution over the country.
The advance sheets sent out from this room average over a ton a day.

This department is also the pamphlet stock room, where the back numbers are stored. From the resources of this room any lawyer can secure, by return of mail, a printed copy of any case published in the entire Reporter System,—and that means any of the 275,000 latest decisions of the country. The fee is 25 cents! This is a different situation from that which existed a few years ago, when copies of cases could only be obtained in manuscript form from the court records, and the fee for a single opinion might easily run up to from $5 to $10.

In the shipping department the books for which orders have been received from the office above are wrapped for mailing or boxed for express or freight shipment. They average from two to six tons per day throughout the year, and go to every state in the Union, and not infrequently to other countries as well.
The office details of attending to the mail orders of the business include reading and replying to from 500 to 1,000 letters every day; recording orders and shipping the books; and following the “live” accounts on our ledgers with some 30,000 customers, scattered over the whole country.

The permanent records of the office include a card list of correspondents, in a cabinet of 33 double drawers; a “financial standing” cabinet, for the guidance of the credit department in accepting orders from new and old customers; a cabinet of maps, one state to a drawer, showing by a system of colored pegs where the agents of the company are traveling or are to be sent in the future; and of course the usual equipment of ledgers and other books, necessary for recording the sales and accounts, which range from 25 cents to several thousand dollars.

To keep these details in order requires a force of about a hundred clerks, grouped into the sales, bookkeeping, collection, and correspondence departments.

The book stock is in connection with the Sales Department and fills rows of shelves occupying nearly the entire front of this floor. The stock is always changing, and is always full.
It is impossible, after going over the building, to avoid a retrospective glance. The business was begun in 1876 in the corner of one basement room. The present building contains 3½ acres floor space, and is too small for comfort. It began with no capital. The paid-up capital stock is now $1,050,000. It began with no market, and had to make its reputation as it went along. It is now known, by report at least, to practically the entire bar of the country, and counts among its regular customers and subscribers the large majority of the book-buying element in all the states. It gives steady employment to more than 500 persons, and it does not take long for the business transacted by them to run into seven figures.

A development so rapid and substantial is out of the ordinary. It is due to the fact that the company has had something out of the ordinary to offer; and as a matter of fact its managers are prouder of the work that it has done for the legal profession of this country than of its record for dividends. Dividends might be earned in any business, but it is not often that a private business can work incidentally a great public good. This had been notably done in the two chief publications of the West Publishing Co.,– the National Reporter System and the American Digest System.
The National Reporter System has unquestionably revolutionized the whole plan of law reporting, and there are many lawyers still in active practice who can recall the old conditions, and compare them with the new. The decisions of most of the states were published, in those days, in the local series known as the State Reports, but there was no systematic control of the matter. Sometimes the state reporter was a salaried official, sometimes he was a private editor, sometimes he had a subsidy from the state for the publication, sometimes he owned the copyright,—and increased his profits by making small volumes with few cases. Almost invariably, the publication was several years behind the courts. With the best intentions, the reporter would have to hold the opinions until a sufficient number had accumulated to make a volume; and often this period was lengthened by customer or carelessness so that the first authorized publication of a decision—which was authority from the day of its filing—might not come until from five to ten years after its rendition. The whole matter of current reporting was in a state of confusion and uncertainty which made it as difficult to find precedents as it was hazardous not to find them. The late decisions were traps for the unwary; and manuscript copies were expensive.
The establishment of the Northwestern Reporter was the establishment of a method in reporting which signalized a new order of things, although it covered only a group of Northwestern states, and the National Reporter system, bringing all the courts of the country under the same system, was not completed till some years later.

This revolutionary idea was simply to report the decisions from a group of states in one “Reporter.” This insured a sufficient volume of matter to make possible the weekly publication of “advance sheets” in pamphlet form. It also insured a clientele, embracing the bar of several states, which justified the low subscription price of $5 a year. (The decisions of a single state could hardly be supplied to the limited purchasers afforded by a single state for that amount.) It is this combination of states, and cooperation of subscribers from distinct jurisdictions, which explain the utility and success of the Reporters, and which distinguish them from all previous attempts to furnish current case-law promptly and at a low price. The Reporters have brought about prompter publication and lower prices even in the “official series”; and, by taking the equivalent Reporters, it is now possible
for a lawyer to cover the same range of reports as before at about one-fourth the cost, or to make the same amount of money go four times as far. And, from the professional standpoint, the immediate and full publication of decisions from all the scattered jurisdictions has led to the harmonizing of judicial rulings, and has saved much of that “conflict” which is the greatest embarrassment of the bar,—and of the bench. The Reporters stand for prompt, systematic, exhaustive, economical, and reliable law reporting.

What the National Reporter System has done in the field of reporting, the American Digest System has done in the field of digesting. This System covers the whole field of American judicial precedents,—and it is the only enterprise which undertakes to do so. The Century Edition, in one series of fifty volumes, gives a systematic digest of all law points in all reported American cases from the earliest times down to 1896, under one alphabetical arrangement of subjects. The current edition of the American Digest supplements the Century by covering the current decisions subsequent to 1896 on the same plan; and this edition is supplemented, in turn, by the Bimonthly Digest, issued as a stout pamphlet every two months.
The West Publishing Co.’s list includes also several sets of Reports, reprint or new; text-books; statutes, digests, and other law books. A full descriptive list will be furnished on request. The number of volumes actually put out into the hands of the lawyers justifies literally the caption of the account, “Law Books by the Million.”
THE CLUB.

The West Publishing Co. Employes’ Club is not a part of the official business of the corporation, yet it will probably be as interesting to visitors as any other department. It represents one of the latter-day efforts to give the laborer something more than his stipulated hire in recognition of his human place in the general scheme of things.

In the summer of 1900, the company rented a three-story building directly across the street from the office establishment, and placed it, rent free and furnished, at the disposal of this club, formed exclusively of employes in the business, and including nearly the entire force,—though of course membership is neither enforced nor urged. It is a voluntary association formed for the purpose of establishing a better acquaintance among the employes themselves. The Club elects its own officers and directors, makes its own By-Laws, and pays its own current expenses from its monthly dues and earnings.

The Club building contains three floors and a basement. The first floor is the general assembly room, and is used for general gatherings, dancing, etc. In the summer it is used for the storage of bicycles during business hours.

At the rear of the first floor is the Ladies’ Room, fitted up with easy chairs, couches with cushions, a piano, and other accessories to enable weary girls to make the most restful use of the noon hour. A girls’ club holds fortnightly meetings here.

The second floor includes a reading room, equipped with all the current magazines and important journals; the restaurant, fitted up to serve “meals at all hours”; and, in the rear, the kitchen. Of course it is used chiefly for midday luncheons. The equipment is of the best. The management of the restaurant is in the hands of the Club, and is on the co-operative basis, prices being made barely high enough to cover the cost. Members thus get the benefit of the economical management.

The third floor is fitted up as a smoking room for the men, and is equipped with pool and billiard tables, tables for whist parties, etc. A whist club meets here every Saturday evening, and the other tables are in constant use every noon and evening.
CHARLESTON LAW REVIEW

THE CLUB RESTAURANT.

A CORNER OF THE CLUB READING ROOM.

THE BILLIARD ROOM.
2012] West Words, Ho!

A gymnasium for boys in the basement is one of the things looked forward to.

The rooms are in constant requisition by club members for evening parties, and the constant use of the different facilities afforded by the building is the best proof that it has happily filled a real need, and that it has a future of material usefulness,— and perhaps of something more.
APPENDIX B:
PLEADING AND PRACTICE GRAND MARCH
(EDWARD THOMPSON 1896)

Compliments of
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CHARLESTON LAW REVIEW

[Volume 6]
2012] West Words, Ho!

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West Words, Ho!

Don't worry about your procedure but use The Encyclopaedia of Pleading and Practice

Edward Thompson Company
Publishers
Northport, Long Island, N.Y.
HOW THE BRITISH GUN CONTROL PROGRAM PRECIPITATED THE AMERICAN REVOLUTION

David B. Kopel*

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Understanding the United States Constitution requires understanding the British practices that drove the Americans to armed revolution. For example, Supreme Court Justices have looked at the British government’s violation of the right of confrontation, the use of general warrants, unrepresentative

* Adjunct Professor of Advanced Constitutional Law, Denver University, Sturm College of Law. Research Director, Independence Institute, Denver, Colorado. Associate Policy Analyst, Cato Institute, Washington, D.C. Kopel is the author of fourteen books and over eighty scholarly journal articles, including the first law school textbook on the Second Amendment. NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY, & MICHAEL P. O’SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY (2012). This Article is a
government as exemplified by taxation without representation,\(^3\) 
unrepresentative government as exemplified by the grotesquely 
malapportioned "rotten boroughs" which elected the Members of 
Parliament,\(^4\) and the violation of the right to trial by jury via use 
of vice-admiralty courts.\(^5\) Similarly, the enumeration of the right 
to petition in the First Amendment is in part a result of the 
Royal Governors denying towns their right to send them 
petitions of complaint.\(^6\)

As a general rule, Justice Harlan’s oft-cited \(^7\) dissenting 
opinion in *Poe v. Ullman* explained that judges engaged in “the 
supplying of content” to the constitutional concept of “liberty” 
should do so “having regard to what history teaches are the 
traditions from which it developed as well as the traditions from 
which it broke.”\(^8\)

Like the First Amendment in the 1930s, the Second 
Amendment today is at an early stage of judicial exposition. The 
Supreme Court’s decisions in *District of Columbia v. Heller* and

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revised and extended version of a portion of the textbook written by Kopel. 
Kopel’s website is http://www.davekopel.org.

Thanks to David Young, Clayton Cramer, Adam Winkler, and readers of the Volokh Conspiracy weblog for helpful suggestions. Any errors are the 
faul of King George III and his nefarious ministers.

examination practices [had been] used in the Colonies.”).


dissenting).


(Rehnquist, J., dissenting). For background on the vice-admiralty courts, see 
CARL UBELHOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN 
REVOLUTION (1961) (arguing that the Americans overstated the alleged 
problems with those courts).

6. See, e.g., RICHARD D. BROWN, REVOLUTIONARY POLITICS IN 
MASSACHUSETTS: THE BOSTON COMMITTEE OF CORRESPONDENCE AND THE TOWNS: 

7. See, e.g., Washington v. Glucksburg, 521 U.S. 702, 765 (1997) (Souter, 
J., concurring); Montana v. Egelhoff, 518 U.S. 37, 74 n.1 (1996) (Souter, J., 
dissenting); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) 
(plurality opinion); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 
476 U.S. 747, 780 n.10 (1986) (Stevens, J., concurring); Moore v. City of E. 
Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion).

McDonald v. City of Chicago both treated history and tradition as extremely important in determining the legal meaning of the Second Amendment, and its enforcement by the Fourteenth Amendment. Federal courts have differed in exactly how to use history and tradition, but there is little doubt that history and tradition are crucial to resolving modern gun control issues.

This Article chronologically reviews British gun control which precipitated the American Revolution: the 1774 import ban on firearms and gun powder; the 1774–1775 confiscation of firearms and gun powder from individuals and from local governments; and the use of violence to effectuate the confiscations. It was these events which changed a situation of rising political tension into a shooting war.

Each of these British abuses provide insight into the scope of the modern Second Amendment. Although these abuses are not being repeated precisely in their original form, they are examples of a general type of abuse—just as criminal trials of Americans in vice-admiralty courts were one way in which the right to trial by jury could be denied.

From the events of 1774–1775, we can discern that import restrictions or bans on firearms or ammunition are constitutionally suspect—at least if their purpose is to disarm the public, rather than for the normal purposes of import controls (e.g., raising tax revenue, or protecting domestic industry). We can discern that broad attempts to disarm the people of a town,

10. E.g., Ezell v. City of Chicago, 651 F.3d 684, 702 (7th Cir. 2011) (describing the “original public meaning as both a starting point and an important constraint on the analysis” of the Second Amendment); Heller v. District of Columbia (Heller II), No. 10-7036, 2011 WL 4551558, at *23–27 (D.C. Cir. Oct. 4, 2011) (Kavanaugh, J., dissenting) (arguing that courts should look to history and tradition in assessing the constitutionality of particular gun controls.).

or to render them defenseless, are anathema to the Second Amendment; such disarmament is what the British tried to impose, and what the Americans fought a war to ensure could never again happen in America. Similarly, gun licensing laws that have the purpose or effect of allowing only a minority of the people to keep and bear arms would be unconstitutional. Finally, we see that government violence—which should always be carefully constrained and controlled—should be especially discouraged when it is used to take firearms away from peaceable citizens. Use of the military for law enforcement is particularly odious to the principles upon which the American Revolution was based.

I. FROM THE TEA PARTY TO THE IMPORT BAN

A. The Intolerable Acts

In 1773, Parliament enacted the Tea Act, reinforcing a tax which the Americans considered flagrantly unlawful.\(^\text{11}\) They believed that taxation without consent was simply theft, for only through a representative legislature could the people consent to taxation.\(^\text{12}\)

Moreover, the tea tax was to be used to pay for the support of royal governors and other royal dependents in America, thus

11. Tea Act, 13 Geo. 3, c. 44 (1773) (Eng.). The Tea Act was a scheme to get rid of excess tea owned by the British East India Company. The tea tax itself was not new but, rather, was the last remnant of the 1767 Townshend Duties, all of which (except for tea) had been repealed in 1770. While the taxes were supposed to raise some revenue, their essential point was to affirm the principle that Parliament could tax the American colonies without their consent. In the mainstream British view, the Americans had “virtual representation” in Parliament, even though the Americans had not voted to elect any of the Members of Parliament.

12. E.g., Letters from a Farmer in Pennsylvania to the Inhabitants of the British Colonies, in 2 The Political Writings of John Dickinson 309 (Paul Leicester Ford ed., Philadelphia 1895) (Parliament cannot tax New Yorkers by requiring that the New York legislature pay for the quartering of British soldiers in New York. New Yorkers cannot “be legally taxed but by their own representatives.” Therefore, Parliament’s suspension of the New York legislature was punishment for what New Yorkers legally had a right to do.). In the American view, Americans could only be taxed by their own colonial legislatures.
making the royal administration entirely dependent on the crown and independent of the people whom it was governing.\textsuperscript{13}

The Tea Act required Americans to buy their tea solely from the East India Company, a monopoly created by Parliament.\textsuperscript{14} As Americans were well aware, the East India Company had turned itself into the actual government of east India, and there, the Company’s irresponsible, ruthless, and inhumane greed had been directly responsible for millions of deaths in the Bengal famine of 1770.\textsuperscript{15}

So, to many Americans, the issues were simple: Would the Americans surrender their natural right of self-government—a right guaranteed by the colonial charters? Would they submit to the tea tax—the tip of the spear for the principle that Parliament could tax, govern, and impose its rule without American consent? Would they allow England to press down upon America the corrupt class of royal toadies who would rule America by force, as they did east India? Would they allow England to siphon off the productive wealth of Americans and gladly watch Americans die in order to enhance their own corrupt profits?\textsuperscript{16}

Mass opposition by the people of Boston prevented the unloading of three tea ships moored in the Boston harbor.\textsuperscript{17} The Royal Governor, Thomas Hutchinson, decided that the ships must be unloaded on December 17, 1773.\textsuperscript{18} So on the evening of December 16, about a hundred Bostonians—supported by a crowd of thousands who safeguarded them—disguised themselves with war paint and Indian clothing, boarded the three ships carrying East India Company cargo, and dumped forty-six tons of tea into the water.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{13} Tea Act, 13 Geo. 3, c. 44 (1773) (Eng.).
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{See generally} BENJAMIN L. CARP, DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY & THE MAKING OF AMERICA (2010).
\item \textsuperscript{16} \textit{Id.} at 13–24.
\item \textsuperscript{17} ROBERT J. ALLISON, THE AMERICAN REVOLUTION 17 (2011).
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} CARP, supra note 15, at 13–24. Earlier that day, a meeting of several thousand men from Boston and nearby towns had voted that the tea ships must leave the harbor that day. \textit{Id.}
\end{itemize}

Among the participants in the Tea Party was the physician Elisha
Furious about the Boston Tea Party, Parliament in 1774 passed the Coercive Acts, known in the Colonies as the Intolerable Acts. The Acts included several harsh measures:

- The Boston Port Act shut the port of Boston until the damages from the Tea Party were repaid;
- The Massachusetts Government Act put most of the colonial government under the direct control of the crown-appointed Royal Governor appointed by the King, and abolished the rights that had been recognized by the colonial charter. The Act also forbade holding town meetings, a common form of municipal self-government, more than once a year;
- The Administration of Justice Act authorized the Royal Governor to move trials of royal officials outside of Massachusetts—a law that George Washington denounced as the “Murder Act” because he feared it would allow British officials to commit crimes with impunity;
- The Quartering Act authorized the Governors of every colony to designate unoccupied buildings or public accommodations (e.g., inns) for quartering British soldiers. The 1774 Quartering Act was a response to the colonial legislatures’ general neglect of their obligation (imposed by Parliament’s 1765 Quartering

Story. Id. at 239. His son, Joseph Story, became one of the greatest Justices of the United States Supreme Court and the preeminent legal scholar of early nineteenth century America. His treatises explained the Second Amendment as an individual right whose main purpose was to deter tyranny and to restore constitutional government in case a tyrant seized power. See David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. Rev. 1359, 1388–97.

21. Port Act, 14 Geo. 3, c. 19, § 1 (1774) (Eng.).
22. Id.
23. American Rebellion Act, 14 Geo. 3, c. 45 (1774) (Eng.).
24. Id. at c. 39.
26. Quartering Act, 14 Geo. 3, c. 54 (1774) (Eng.).
Act)\textsuperscript{27} to provide quarters for British soldiers in North America. Once the French had been driven out of North America by the 1763 Anglo-American victory in the French and Indian War, the Americans expected the British troops who had been sent to fight the war to be sent back home.\textsuperscript{28} Parliament decided to keep the troops in North America after the war ended, and many Americans regarded the presence of a standing army as a plot to intimidate and oppress the colonists;\textsuperscript{29}

- The Quebec Act defined the Quebec colony as extending far down into the Allegheny Mountains, thereby negating many American land claims in the West.\textsuperscript{30}

The Intolerable Acts were offensive, but it was the possibility that the British might deploy the army to enforce them that primed many colonists for armed resistance. The Patriots of Lancaster County, Pennsylvania, resolved: “[t]hat in the event of Great Britain attempting to force unjust laws upon us by the strength of arms, our cause we leave to heaven and our rifles.”\textsuperscript{31}

A South Carolina newspaper essay, reprinted in Virginia, urged that any law that had to be enforced by the military was necessarily illegitimate:

> When an Army is sent to enforce Laws, it is always an Evidence that either the Law makers are conscious that they had no clear and indisputable right to make those Laws, or that they are bad [and] oppressive. Wherever the People themselves have had a hand in making Laws, according to the first principles of our Constitution there is no danger of Non-submission, Nor can there be need of an Army to enforce

\textsuperscript{27} Importation Act, 5 Geo. 3, c. 5 (1765) (Eng.) (“An act for punishing mutiny and desertion, and for better payment of the army and their quarters.”).

\textsuperscript{28} AMERICAN MILITARY HISTORY 22 (Brad Lookingbill ed., 2011).

\textsuperscript{29} Id.

\textsuperscript{30} Quebec Act, 14 Geo 3, c. 83 (1774) (Eng.).

\textsuperscript{31} Horace Kephart, \textit{The Birth of the American Army}, 98 HARPER’S NEW MONTHLY MAG., Dec. 1898–May 1899, at 963 (quoting the Hanover Resolves (June 4, 1774)).
them.  

The Royal Governor of Massachusetts, General Thomas Gage, dispatched the Redcoats to break up an illegal town meeting in Salem. But when large numbers of armed Americans appeared in response, the British retreated. Gage’s aide John Andrews explained:

[T]here was upwards of three thousand men assembled there from the adjacent towns, with full determination to rescue the Committee if they should be sent to prison, Even if they were Oblig’d to repel force by force, being sufficiently provided for such a purpose; as indeed they are all through the country—every male above the age of 16 possessing a firelock with double the quantity of powder and ball enjoin’d by law.

Military rule would be difficult to impose on an armed populace. Gage had only 2,000 troops in Boston. There were thousands of armed men in Boston and more in the surrounding area. One response to the problem was to deprive the Americans of gunpowder.

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34. Id.

35. Id. at 44 The essay also argued for the superiority of a well-regulated militia to a standing army, the former being no threat to liberty. Id.


37. Id. at 82–83, 86–87.
B. The Powder Alarm

Modern smokeless gunpowder is stable under most conditions.38 The black powder of the eighteenth century was far more volatile.39 Accordingly, large quantities of black powder were often stored in a town’s powder house, typically a reinforced brick building.40 The powder house would hold merchants’ reserves—large quantities stored by individuals—as well as powder for use by the local militia.41 Although colonial laws generally required militiamen (and sometimes every householder, as well) to supply their own firearm and a minimum quantity of powder, not everyone could afford it.42 Consequently, the government sometimes supplied public arms and powder to individual militiamen.43 Policies varied on whether militiamen who had been given public arms would keep them at home.44 Public arms would often be stored in a special armory, which might also be the powder house.45

The British became concerned that Massachusetts towns had been withdrawing their gunpowder from the powder houses.46 Before dawn on September 1, 1774, 260 Redcoats acting on General Gage’s order sailed up the Mystic River and seized hundreds of barrels of powder from the Charlestown powder house (next to the present site of Tufts University, in what is now Somerville).47 The only powder that was left to take belonged to the colonial government, so Gage was within his legal rights to seize it. But the seizure still incensed the public.48

The “Powder Alarm,” as it became known, was a serious

39. Id.
40. Id.
41. Id.
42. Id.
43. Id. at 104.
44. Id.
45. Id.
46. See DAVID HACKETT FISCHER, PAUL REVERE’S RIDE 44–51 (1994).
47. Id. at 44–45.
48. Id. at 45.
provocation. By the end of the day on September 1, 20,000 militiamen had mobilized and started marching toward Boston. In Connecticut and western Massachusetts, rumors quickly spread that the Powder Alarm actually involved fighting in the streets of Boston. More accurate reports reached the militia companies before those militia reached Boston, and so the war did not begin in September. The militia message, though, was unmistakable: if the British used violence to seize arms or powder, the Americans would treat that seizure as an act of war, and the militia would fight. And that is exactly what happened several months later, on April 19, 1775.

The people of Worcester County, Massachusetts, had already been meeting in county convention, with delegates sent by the towns. Five days after the Powder Alarm, on September 6, the militia of the towns of Worcester County assembled on the Worcester Common. Backed by the formidable array, the Worcester Convention took over the reins of government, and ordered the resignations of all militia officers, who had received their commissions from the Royal Governor. The officers promptly resigned, and then received new commissions from the Worcester Convention.

That same day that Worcester County ended all royal authority over the militia, the people of Suffolk County (which includes Boston) assembled and adopted the Suffolk Resolves.

50. BROWN, supra note 6, at 225–27.
51. Id.
52. Id. at 216.
53. Id.
54. Id.
2012] British Gun Control

The nineteen points of political principle, grievance, and plans for action included:

9. That the fortifications begun and now carrying on upon Boston Neck are justly alarming to this county, and gives us reason to apprehend some hostile intention against that town, more especially as the commander in chief has, in a very extraordinary manner, removed the powder from the magazine at Charlestown, and has also forbidden the keeper of the magazine at Boston, to deliver out to the owners, the powder, which they had lodged in said magazine . . . .

11. That whereas our enemies have flattered themselves that they shall make an easy prey of this numerous, brave and hardy people, from an apprehension that they are unacquainted with military discipline; we, therefore, for the honour, defence and security of this county and province, advise, as it has been recommended to take away all commissions from the officers of the militia, that those who now hold commissions, or such other persons, be elected in each town as officers in the militia, as shall be judged of sufficient capacity for that purpose, and who have evidenced themselves the inflexible friends to the rights of the people; and that the inhabitants of those towns and districts, who are qualified, do use their utmost diligence to acquaint themselves with the art of war as soon as possible, and do, for that purpose, appear under arms at least once every week.

In other words, the people of Suffolk County, aggrieved at the seizure of gun powder, took control of the local militia away from the Royal Governor (by replacing the Governor’s appointed officers with officers elected by the militia), and resolved to engage in group practice with arms at least weekly.

The Suffolk Resolves were distributed across the colonies;

57. An isthmus connecting Boston to the mainland. The surrounding waters were later filled in by development.

58. Warren, supra note 56. According to Richmond, the only powder left on September 1, 1774, belonged to the state government, of which the Royal Governor was the chief executive. RICHMOND, supra note 56, at 5. However, the Suffolk Resolves indicate that merchants still had some of their own powder in the Charleston Powder House. See Warren, supra note 56.

59. Warren, supra note 56.
Paul Revere rode them down to the First Continental Congress, which had just assembled in Philadelphia. The Congress unanimously condemned Britain’s “wicked ministerial measures,” endorsed the course of action that had been adopted by the Suffolk Resolves, and urged all the other colonies to send supplies to help the Bostonians.

Governor Gage directed the Redcoats to begin general, warrantless searches for arms and ammunition. Many of these searches were conducted when people tried to enter Boston by ship, or by the narrow land “neck” which led to the city. Nearby Worcester County sent a complaint to General Gage:

This county are constrained to observe, they apprehend the people justifiable in providing for their own defence, while they understood there was no passing the neck without examination, the cannon at the north battery spiked up, and many places searched, where arms and ammunition were suspected to be, and if found, seized; yet as the people have never acted offensively, nor discovered any disposition so to do, till as above related, the county apprehend this can never justify the seizure of private property.

According to the Boston Gazette, of all General Gage’s offenses, “what most irritated the People” was “seizing their Arms and Ammunition.”

When the Massachusetts Assembly convened, General Gage declared it illegal, so the representatives reassembled as the “Provincial Congress,” with the wealthy merchant John Hancock presiding. On October 26, 1774, the Massachusetts Provincial Congress adopted a resolution condemning military rule and

60. RICHMOND, supra note 36, at 78.
63. Id.
64. THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS 645 (1838) (cataloging the Worcester Convention of September 21, 1774).
66. Id. at 104.
criticizing Gage for “unlawfully seizing and retaining large quantities of ammunition in the arsenal at Boston.” The Provincial Congress urged all militia companies to organize and elect officers. The new elections would mean removal of officers who had been appointed by the Royal Governor. At least a quarter of the militia (the famous Minute Men) was directed to “equip and hold themselves in readiness to march at the shortest notice.” The Provincial Congress further declared:

That, as the security of the lives, liberties and properties of the inhabitants of this province depends, under Providence, on their knowledge and skill in the art military, and in their being properly and effectually armed and equipped, it is therefore recommended, [if any of the inhabitants have not provided themselves with arms and ammunition according to law,] that they immediately provide themselves therewith; and [that] they use their utmost diligence to perfect themselves in military skill . . . .

That is, everyone who did not already have a gun should get one, and start practicing with it diligently. So as one historian put it, “one of the anxieties of every citizen was to get a good gun and keep in repair.”

In flagrant defiance of royal authority, the Provincial Congress appointed a Committee of Safety and vested it with the power to call forth the militia. The militia of Massachusetts no longer answered to the British government. It was now the instrument of what was becoming an independent government of Massachusetts.

67. THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS 31 (1838) (detailing the First Provincial Congress of Massachusetts on October 26, 1774).
68. Id. at 33.
69. Id.
70. Id.
71. Id. at 34.
C. Disarmament Orders from London

Information traveled across the Atlantic at the speed of a sailing ship. The average trip was two months, so it is unknown precisely when the British government learned of the Powder Alarm and the American response. But we do know that the British government generally approved of Gage’s policies. Lord Dartmouth, the royal Secretary of State for America, sent Gage a letter on October 17, 1774, urging him to disarm New England, to the extent reasonably possible:

Amongst other things which have occurred on the present occasion as likely to prevent the fatal consequence of having recourse to the sword, that of disarming the Inhabitants of the Massachusetts Bay, Connecticut and Rhode Island, has been suggested. Whether such a Measure was ever practicable, or whether it can be attempted in the present state of things you must be the best judge; but it certainly is a Measure of such a nature as ought not to be adopted without almost a certainty of success, and therefore I only throw it out for your consideration.74

Gage received Dartmouth’s letter on December 3.75 His reply explained that the only way to take guns away from the Americans would be to use force: “Your Lordship’s Idea of disarming certain Provinces would doubtless be consistent with Prudence and Safety, but it neither is nor has been practicable without having Recourse to Force, and being Masters of the Country.”76

Gage’s letter was made public by a reading in the British House of Commons.77 It was then picked up and publicized in

76. Id. at 387.
77. 18 William Cobbett, The Parliamentary History of England, From the Earliest Period to the Year 1803, at 106 (London, T.C. Hansard,
America as proof of Britain’s malign intentions.\textsuperscript{78}

D. The Import Ban

Two days after Lord Dartmouth dispatched his disarmament recommendation to General Gage, King George III and his ministers blocked importation of arms and ammunition to America.\textsuperscript{79} The six-month decree was repeatedly renewed, remaining in effect until the Anglo-American peace treaty in 1783.\textsuperscript{80}

Read literally, the order only required a government permit to export arms or ammunition from Great Britain to America. In practice, no permits were granted. The Crown sent orders to the colonial governors (via Gage, for distribution), and to the British navy, to immediately block all arms and ammunition shipments.

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\textsuperscript{79} The proclamation imposing the ban stated:

And His Majesty judging it necessary to prohibit the Exportation of Gunpowder, or any sort of Arms or Ammunition, out of this Kingdom, doth therefore, with the advice of his Privy Council, hereby order, require, prohibit and command that no Person or Persons Whatsoever (except the Master General of the Ordnance for his Majesty’s Service) do, at any time during the space of Six Months from the date of this Order in Council, presume to transport into any parts out of this Kingdom, or carry coastways any Gunpowder, or any sort of Arms or Ammunition, on board any Ship or Vessel, in order to transporting the same to any part beyond the Seas or carrying the same coastways, without Leave and Permission in that behalf, first obtained from his Majesty or his Privy Council, upon Pain of incurring and suffering the respective Forfeitures and Penalties inflicted by the aforementioned Act . . . .

\textsuperscript{80} James Truslow Adams, Revolutionary New England: 1691–1776, at 412 (1923).

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into the thirteen colonies. The concerns were well founded. Benjamin Franklin was masterminding the import of arms and ammunition from the Netherlands, France, and Spain.

The Boston Committee of Correspondence learned of the arms embargo, and promptly dispatched Paul Revere to New Hampshire, with the warning that two British ships were headed to Fort William and Mary, near Portsmouth, New Hampshire, to seize firearms, cannons, and gunpowder. On December 14, 1774, four hundred New Hampshire patriots preemptively captured all the material at the fort. A New Hampshire newspaper argued that the capture was prudent and proper, reminding readers that the ancient Carthaginians had consented to “deliver up all their Arms to the Romans,” and were decimated by the Romans soon after. The parallels with America seemed

81. Knollenberg, supra note 73, at 204–05.


83. Richmond, supra note 36, at 95.

84. Historically in the colonies, Committees of Correspondence had been informal organizations that took over some of the functions of local government when the formal government was unable to function properly, or was hostile to the public will. A common function was to organize public objection or action against a problem, or a threat to liberty. In response to rising tensions with Great Britain, a Boston town meeting in 1772 created Committee of Correspondence, consisting of twenty-one men. Similar committees formed in other colonies. See generally Brown, supra note 6.

85. Id.

86. Id.

plain:

Could they [the Ministry] not have given up their Plan for enslaving *America* without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies? . . . And shall we like the *Carthaginians*, peaceably surrender our Arms to our Enemies, in Hopes of obtaining in Return the Liberties we have so long been contending for?

. . .

I . . . hope that no person will, at this important Crisis, be unprepared to act in his own defence, should he, by necessity, be driven thereto. And I must here beg leave to recommend consideration to the people on this Continent, whether, when we are by an arbitrary decree prohibited the having Arms and Ammunition by importation, we have not by the law of self-preservation, a right to seize upon all those within our power, in order to defend the liberties which God and Nature have given us.88

Edmund Burke, the intellectual founder of conservative political thought, was among the minority of Members of Parliament who urged accommodation of American concerns.89 He introduced the “Speech on Conciliation with the Colonies,” which proposed to stop British taxation of domestic commerce in the thirteen colonies.90 Speaking in support of the Resolutions, Burke compared the attempt to disarm America with the previous disarmament of the Welsh:

Sir, during that state of things, Parliament was not idle. They attempted to subdue the fierce spirit of the Welsh by all sorts of rigorous laws. They prohibited by statute the sending all sorts of arms into Wales, as you prohibit by proclamation (with something more of doubt on the legality) the sending arms to

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90. *Id.*
America. They disarmed the Welsh by statute, as you attempted (but still with more question on the legality) to disarm New England by an instruction.91

Another moderate, the Duke of Manchester, “cautioned the House to proceed with deliberation, as America had now three millions of people, and most of them were trained to arms, and he was certain they could now produce a stronger army than Great-Britain.”92

The British government, however, was in no mood for conciliation. The October-November 1774 elections for the House of Commons had strengthened the ruling Tories so that they could ignore the Whigs’ opposition to Tory determination to subdue America speedily and by force.93

The Massachusetts Provincial Congress took steps to accelerate domestic arms manufacture. The Congress offered to purchase “so many effective arms and bayonets as can be delivered in a reasonable time upon notice given to this congress at its next session.”94 Massachusetts also urged American

91. Id. at 208. Burke was probably referring to the Penal Laws against Wales which were enacted by Parliament in response to the Welsh Revolt (1400–15), led by Owain Glyndŵr (in English, Owen Glendower). The laws were little enforced after 1440, and are widely thought to have been repealed by the Laws in Wales Acts (1535 and 1542). However, formal repeal was not accomplished until 1624. 4 & 5 Jac. 1, c. 1 (1624) (Eng.); 21 Jac. 1, c. 10, 28 (1624) (Eng.). Similar laws were imposed at various times against Ireland and against Scotland, for the purpose of suppressing national independence movements. See, e.g., Heller, 554 U.S. at ___, 128 S. Ct. 2783, 2795 n.10 (describing laws to disarm the Scottish Highlanders); An Act for the Better Securing the Government, by Disarming Papists, 7 Will. 3, c. 5 (1695) (Eng.) (stating that no Irish Catholics may have arms, or ammunition, or be instructed in how to manufacture them; all Irish Catholic homes may be searched for arms); An Act for the Preservation of the Game, 10 Will. 3, c. 8 (1698) (Eng.) (“No papist shall be employed as a fowler for any protestant, or under colour thereof keep fire arms.”); An Act to Explain, Amend, and Make More Effectual an Act . . . Disarming Papists, 13 Geo. 2, c. 6 (1739) (Eng.) (stating that justices of the peace, magistrates, and other local officials must conduct annual searches for Irish Catholic arms).

92. Brief in Support of Respondent, supra note 79, at 12 n.28 (quoting PA. REP., April 17, 1775, at 2, col. 3).


94. 2 WILLIAM VINCENT WELLS, THE LIFE AND PUBLIC SERVICES OF SAMUEL ADAMS 273 (Boston, Little, Brown, & Co, 1865).
gunsmiths and other “such persons as are skilled in the manufacturing of firearms and bayonets, diligently to apply themselves thereto, for supplying such of the inhabitants as may still be deficient.” 95 A few weeks earlier, the Congress had resolved: “That it be recommended . . . to all the inhabitants of this Colony, that they be diligently attentive in learning the use of arms . . . .” 96

II. COERCIVE DISARMAMENT AND AMERICAN DEFiance

The ideology underlying all forms of American resistance to British usurpations and infringements was explicitly premised on the right of self-defense of all inalienable rights; from the self-defense foundation was constructed a political theory in which the people were the masters and government the servant, so that the people have the right to remove a disobedient servant. The philosophy was not novel, but was directly derived from political and legal philosophers such as John Locke, Hugo Grotius, and Edward Coke. 97

The British government was not, in a purely formal sense, attempting to abolish the Americans’ common law right of self-defense. Yet in practice, that was precisely what the British were attempting. First, by disarming the Americans, the British were attempting to make the practical exercise of the right of personal self-defense much more difficult. Second, and more fundamentally, the Americans made no distinction between self-defense against a lone criminal or against a criminal government. 98 To the Americans (and to their British Whig


97. See, e.g., Brown, supra note 6, at 68–74 (1976) (explaining the Boston Committee of Correspondence’s first letter to the other towns in Massachusetts in these terms); David B. Kopel et al., The Human Right of Self-Defense, 22 BYU J. Pub. L. 43 (2008) (explaining personal self-defense as the foundation of the political philosophy of Grotius, Puffendorf, Vattel, Burlamaqui, and other European scholars on whom the Americans relied).

98. See Don B. Kates, The Second Amendment and the Ideology of Self-
ancestors), the right of self-defense necessarily implied the right of armed self-defense against tyranny.

A. Patrick Henry Calls Virginia to Arms

The troubles in New England inflamed the other colonies. The day after Burke proposed his “Resolutions for Conciliation with America” to Parliament, the Virginia legislature witnessed one of the most famous speeches of the Revolution. The Virginia House of Burgesses was meeting as a special Convention in Richmond, because the Royal Governor, Lord Dunmore, had suspended the Virginia Assembly.

Patrick Henry’s great speech to the convention on March 23, 1775, used an escalating series of rhetorical questions, climaxed by a call to arms. Although there is no extant text of Henry’s speech, the version that became well-known by succeeding generations was compiled by U.S. Attorney General (1817–29) William Wirt in his biography Sketches of the Life and Character of Patrick Henry. He explained that the British plainly meant


100. Id. at 113–14.
101. Id. at 121–23.
102. Id. Patrick Henry was an Anglican, but his Presbyterian mother often took him to hear the brilliant Virginia Presbyterian minister Samuel Davies, who directly influenced Henry on the necessity of manly resistance to tyranny, and whose evangelical, emotional, dramatic, and direct style of preaching greatly influenced Henry’s oratory as a lawyer and then as a politician. See Henry Mayer, A Son of Thunder: Patrick Henry and the American Revolution 36–39 (1991). For example, during the French & Indian War, Davies had preached:

Must peace then be maintained? Maintained with our perfidious and cruel invaders? Maintained at the expense of property, liberty, life, and everything dear and valuable? Maintained when it is in our power to vindicate our right and do ourselves justice? Is the word of peace then our only business? No; in such a time even the God of Peace proclaims by His providence, “To arms!”

to subjugate America by force of arms.\textsuperscript{103} Every attempt by the Americans at peaceful reconciliation had been rebuffed.\textsuperscript{104} The only remaining alternatives for the Americans were to accept slavery or to take up arms.\textsuperscript{105} If the Americans did not act soon, the British would soon disarm them, and all hope would be lost.\textsuperscript{106} The numerous Americans in their vast land, “armed in the holy cause of liberty,” would be invincible:

\begin{quotation}
I ask gentlemen, sir, what means this martial array if its purpose be not to force us to submission? Can gentlemen assign any other possible motive for it? Has Great Britain any enemy, in this quarter of the world to call for all this accumulation of navies and armies? No, sir, she has none. They are meant for us: they can be meant for no other. They are sent over to bind and rivet upon us those chains which the British ministry have been so long forging.

Sir, we have done everything that could be done to avert the storm which is now coming on. We have petitioned— we have remonstrated— we have supplicated— we have prostrated ourselves before the throne, and have implored its interposition to arrest the tyrannical hands of the ministry and Parliament. Our petitions have been slighted; our remonstrances have produced additional violence and insult; our supplications have been disregarded; and we have been spurned, with contempt, from the foot of the throne!

In vain, after these things, may we indulge the fond hope of peace and reconciliation. There is no longer any room for hope. If we wish to be free—if we mean to preserve inviolate those inestimable privileges for which we have been so long contending—if we mean not basely to abandon the noble struggle in which we have been so long engaged, and which we have pledged ourselves never to abandon until the glorious object of our contest shall be obtained—we must fight! I repeat it, sir, we must fight! An appeal to arms and to the God of Hosts is all that is left us!
\end{quotation}

\begin{flushright}
\begin{verse}
\textsuperscript{103} See \textit{Wirt}, supra note 99, at 121–23.
\textsuperscript{104} \textit{Id}.
\textsuperscript{105} \textit{Id}.
\textsuperscript{106} \textit{Id}.
\end{verse}
\end{flushright}
They tell us, sir, that we are weak—unable to cope with so formidable an adversary. But when shall we be stronger? Will it be the next week, or the next year? Will it be when we are totally disarmed, and when a British guard shall be stationed in every house? Shall we gather strength by irresolution and inaction? Shall we acquire the means of effectual resistance by lying supinely on our backs, and hugging the delusive phantom of Hope, until our enemies shall have bound us hand and foot?

Sir, we are not weak, if we make a proper use of those means which the God of nature hath placed in our power. Three millions of people, armed in the holy cause of liberty, and in such a country as that which we possess, are invincible by any force which our enemy can send against us.

Besides, sir, we shall not fight our battles alone. There is a just God who presides over the destinies of nations, and who will raise up friends to fight our battles for us. The battle, sir, is not to the strong alone; it is to the vigilant, the active, the brave. Besides, sir, we have no election. If we were base enough to desire it, it is now too late to retire from the contest. There is no retreat but in submission and slavery! Our chains are forged, Their clanking may be heard on the plains of Boston! The war is inevitable—and let it come! I repeat it, sir, let it come!

It is in vain, sir, to extenuate the matter. Gentlemen may cry, Peace, Peace—but there is no peace. The war is actually begun. The next gale that sweeps from the north will bring to our ears the clash of resounding arms! Our brethren are already in the field! Why stand we here idle? What is it that gentlemen wish? What would they have? Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty, or give me death!107

The Convention adopted various resolutions proposed by Henry, including: “That a well regulated Militia, composed of Gentlemen and Yeomen, is the natural Strength, and only

Security, of a free Government." 108 In contrast, a standing army is “always subversive of the quiet, and dangerous to the liberties of the people.” 109 A well-regulated militia would “secure our inestimable rights and liberties from those further violations with which they are threatened.” 110

The Convention formed a committee—including Patrick Henry, Richard Henry Lee, George Washington, and Thomas Jefferson—“to prepare a plan for the embodying, arming, and disciplining such a number of men as may be sufficient” to defend the commonwealth. 111 The Convention urged “that every Man be provided with a good Rifle” and “that every Horseman be provided . . . with Pistols and Holsters, a Carbine, or other Firelock.” 112 When the Virginia militiamen assembled a few weeks later, many wore canvas hunting shirts adorned with the motto “Liberty or Death.” 113

In South Carolina, patriots established a government, headed by the “General Committee.” 114 According to the Committee:

[B]y the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them; it was therefore recommended, to all persons, to provide themselves immediately, with at least twelve and a half rounds of powder, with a proportionate quantity of bullets. 115

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109. Id.
111. J.N. Breneman, A History of Virginia Conventions 19 (1902) (quoting resolutions proposed by Patrick Henry).
112. Wirt, supra note 99, at 145.
113. Mayer, supra note 102, at 251.
115. Id. (internal quotations omitted).
B. The Independent Militia Arise

Americans no longer recognized the royal governors as the legitimate commanders-in-chief of the militia.\textsuperscript{116} As noted above, Worcester County, Massachusetts, and the Massachusetts Provincial Congress had acted first, in September 1774, by terminating the commissions of all royally-appointed militia officers and providing officers chosen by the people.\textsuperscript{117}

The First Continental Congress, assembling that same month, soon learned what Massachusetts had done.\textsuperscript{118} Congress’s plan was to urge a complete economic boycott of trade with Great Britain.\textsuperscript{119} But what if the boycott failed to solve the problem? Virginia’s Patrick Henry and Richard Henry Lee introduced a resolution urging mobilization of the militia and preparation for war, since “America is not Now in a State of Peace.”\textsuperscript{120} With some changes in wording to soften the language (such as putting it in the subjunctive tense, thereby making it less direct), the resolution was adopted by the unanimous vote of all the colonies’ delegations.\textsuperscript{121} However, the message that Congress sent to the American people in October did not mention the militia, but simply set forth the details of the boycott, and announced the formation of the Continental Association (comprised of the colonies’ governments) to coordinate the boycott.\textsuperscript{122}

So without formal legal authorization, Americans began to form independent militia, outside the traditional chain of command of the royal governors. In Virginia, George Washington and George Mason organized the Fairfax Independent Militia Company.\textsuperscript{123} Other independent militia embodied in Virginia

\textsuperscript{116} BROWN, supra note 6, at 216.
\textsuperscript{117} Id.
\textsuperscript{118} Mayer, supra note 102, at 223–27; 1 JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1788, at 23–26 (Washington, D.C., Way & Gideon 1823).
\textsuperscript{119} Mayer, supra note 102, at 223–27.
\textsuperscript{120} Id. at 223.
\textsuperscript{121} Id. at 223–27.
\textsuperscript{122} Id. at 226.
\textsuperscript{123} Id. at 242.
along the same model. The volunteer militiamen pledged that “we will, each of us, constantly keep by us” a firelock, “six pounds of Gunpowder [and] twenty pounds of Lead.”

In 1775, George Mason drafted the *Fairfax County Militia Plan for Embodying the People*. The Plan affirmed that “a well regulated Militia, composed of the Gentlemen, Freeholders, and other Freemen” was needed to defend “our ancient Laws & Liberty” from the Redcoats.

And we do each of us, for ourselves respectively, promise and engage to keep a good Fire-lock in proper Order, & to furnish Ourselves as soon as possible with, & always keep by us, one Pound of Gunpowder, four Pounds of Lead, one Dozen Gun Flints, & a pair of Bullet-Moulds, with a Cartouch Box, or powder-horn, and Bag for Balls.

Later, in *Remarks on Annual Elections for the Fairfax Independent Company*, Mason explained that “all men are by nature born equally free and independent.” Because government creates “the most arbitrary and despotic powers this day upon earth,” liberty can only be protected by “frequently appealing to the body of the people.” Roman history, argued Mason, showed that freedom could not be maintained if the government relied on mercenaries. Rather, the people must be taught “the use of arms and discipline” so they can “act in defence of their invaded liberty.”

Independent militia also formed in Connecticut, Rhode Island, New Hampshire, Maryland, and South Carolina. They chose their own officers and rejected the authority of officers who

125. *Id. at 215.*
126. *Id.*
127. *Id.*
128. *Id. at 216.*
129. *Id. at 229.*
130. *Id. at 230.*
131. *Id.*
132. *Id. at 229.*
133. *Knollenberg, supra* note 73, at 214–16.
had been appointed by the royal governors.\footnote{134} John Adams firmly defended the newly constituted Massachusetts militia:

“The new-fangled militia,” as the specious Massachusetts\footnote{135} calls it, is such a militia as he never saw. They are commanded through the province, not by men who procured their commissions from a governor as a reward for making themselves pimps to his tools, and by discovering a hatred of the people but by gentlemen whose estates, abilities and benevolence have rendered them the delight of the soldiers . . . [I]n a land war, this continent might defend itself against all the world.\footnote{136}

C. Gun Confiscation at Lexington and Concord

The American War of Independence—as it was commonly called at the time—began on April 19, 1775, when 700 Redcoats under the command of Major John Pitcairn left Boston to seize American arms at Lexington and Concord.

The militia that assembled at the Lexington Green and the Concord Bridge consisted of able-bodied men aged sixteen to sixty.\footnote{137} They supplied their own firearms, although a few poor men had to borrow a gun.\footnote{138} Warned by Paul Revere and Samuel Dawes of the British advance, the young women of Lexington assembled cartridges late into the evening of April 18.\footnote{139}

At dawn, the 700 British regulars confronted about 200

\footnote{134. \textit{Id.}}

\footnote{135. The young Loyalist lawyer Daniel Leonard, who wrote a series of anti-revolution essays in the \textit{Massachusetts Gazette} and \textit{Boston Post-Boy} in 1774–1775.}

\footnote{136. Letter from Novanglus to the Inhabitants of the Colony of Massachusetts Bay (Feb. 6, 1775), \textit{republished in John Adams \& Jonathan Sewall, Novanglus and Massachusetts; or Political Essays, Published in the Years 1774 and 1775, on the Principal Points of Controversy, Between Great Britain and Her Colonies} 32 (Applewood Books 2009) (1819).}

\footnote{137. \textit{Robert A. Gross, The Minutemen and Their World} 61, 70 (1976).}

\footnote{138. \textit{Id.} at 61–70. The Lexington militia included at least one black man. \textit{Dennis Fraden, Samuel Adams} 110 (1998); \textit{Alice Hinkle, Prince Estabrook: Slave and Soldier} 25–30 (2001). He was freed after serving in the Continental Army. \textit{Id.}}

\footnote{139. \textit{Gross, supra} note 137, at 61–70.}
militiamen at Lexington. “Disperse you Rebels—Damn you, throw down your Arms and disperse!” ordered Major Pitcairn. American folklore remembers the perhaps apocryphal words of militia commander Captain John Parker: “Don’t fire unless fired upon! But if they want to have a war, let it begin here!” It does seem to have been the established American policy to put the onus of firing first on the British. Yet someone pulled a trigger, and although the gun did not go off, the sight of the powder flash in the firing pan instantly prompted the Redcoats to mass fire. The Americans were quickly routed.

With “huzzah” of victory, the Redcoats marched on to Concord, where one of Gage’s spies had told him that the largest Patriot reserve of gunpowder was stored. By one account, the first man in Concord to assemble after the sounding of the alarm was the Reverend William Emerson, gun in hand.

At Concord’s North Bridge, the town militia met with some of the British force, and after a battle of two or three minutes, drove off the British. As the Reverend’s grandson, Ralph Waldo Emerson, later recounted:

By the rude bridge that arched the flood,  
Their flag to April’s breeze unfurled,  
Here once the embattled farmers stood,  
And fired the shot heard round the world.

Notwithstanding the setback at the bridge, the Redcoats had sufficient force to search the town for arms and ammunition. But

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140. See Halbrook Origins of the Second Amendment, supra note 38, at 112.
141. Fischer, supra note 46, at 189.
142. Id. at 191–97.
144. French, supra note 49, at 59.
145. Id. at 150.
146. Id. at 164.
the main powder stores at Concord had been hauled to safety before the Redcoats arrived.148

When the British began to withdraw back to Boston, things got much worse for them. Armed Americans were swarming in from nearby towns. They would soon outnumber the British two-to-one.149 Although some of the Americans cohered in militia units operating under a unified command, a great many of them fought on their own, taking sniper positions at whatever opportunity presented itself.150 Rather than fight in open fields, like European soldiers, the Americans hid behind natural barriers, fired from ambush positions, and harried the Redcoats all the way back to Boston.151 Only British reinforcements dispatched from Boston saved the British expedition from annihilation—and the fact that the Americans started running out of ammunition and gun powder.152

One British officer complained that the Americans acted like “rascals” and fought as “concealed villains” with “the cowardly disposition . . . to murder us all.”153 One British officer reported: “These fellows were generally good marksmen, and many of them used long guns made for Duck-Shooting.”154

British Lieutenant-General Hugh Percy, who had led the rescue of the beleaguered expeditionary force, recounted:

Whoever looks upon them as an irregular mob, will find himself much mistaken. They have men amongst them who

149. Id.
150. FRENCH, supra note 49, at 220.
151. Id. at 220–70.
152. Id. The British expedition was well aware as they marched towards Lexington that the Americans were getting ready to fight. Id. Thanks to warnings from Paul Revere and William Dawes, the word had been spread that the British were coming. Id. The news was further disseminated by the ringing of church bells, and firing of guns as a signal alarm. Id. The sounds of the American guns and bells evidently led Pitcairn to send a request for reinforcements, as the number of armed Americans in the area was far larger than Pitcairn’s force, or, indeed, the entire British army stationed in Boston.
153. GROSS, supra note 137, at 129.
know very well what they are about, having been employed as Rangers [against] the Indians & Canadians, & this country being much [covered with] wood, and hilly, is very advantageous for their method of fighting.

Nor are several of their men void of a spirit of enthusiasm, as we experienced yesterday, for many of them concealed themselves in houses, & advanced within [ten yards] to fire at me & other officers, tho’ they were morally certain of being put to death themselves in an instant.155

Among the American fighters that day were several women and men who were too old for the militia, including a group of elderly men led by David Lamson—a “mulatto.”156

At day’s end, there were fifty Americans killed, thirty-nine wounded, and five missing.157 Among the British sixty-five were killed, 180 wounded, and twenty-seven missing.158 On a per-shot basis, the Americans inflicted higher casualties than the British regulars.159

That night, the American militiamen began laying siege to Boston where General Gage’s standing army was located.160

Two days later in Virginia, Britain again moved to disarm the Americans. On April 21, 1775, Royal authorities confiscated twenty barrels of gunpowder from the public magazine in the capital city of Williamsburg and destroyed the public firearms there by removing their firing mechanisms.161 In response to complaints, manifested most visibly by the mustering of a large

157. ALLISON, supra note 17, at 21.
158. FISCHER, supra note 46, at 321.
159. Id. at 408 n.61.
160. FRENCH, supra note 49, at 265.
independent militia led by Patrick Henry, Governor Dunmore explained he was surprised to hear the people were under arms on this occasion, and that he should not think it prudent to put powder into their hands in such a situation. The confrontation ended peacefully when emissaries of the Governor delivered a legal note promising to pay restitution.

III. THE UNDECLARED WAR TO CONFISCATE ARMS

A. Gun Confiscation in Boston

At Lexington and Concord, coercive disarmament had not worked out for the British. Back in Boston, General Gage recognized that British troops there were heavily outnumbered by armed Bostonians. “[K]nowing that many of the Boston householders had arms, he was afraid the town would rise at his back.” So Gage set out to disarm the Bostonians, but through a strategy that avoided direct force.

On April 23, 1775, Gage offered the Bostonians the opportunity to leave town if they surrendered their arms.

The Boston Selectmen voted to accept the offer, and a massive surrender of arms began. Within days, 2,674 guns were deposited. They consisted, according to one historian, of “1778 fire-arms” (muskets or rifles), “634 pistols, 973 bayonets”

162. Mayer, supra note 102, at 256–57.
163. Id.
164. French, supra note 49, at 56.
165. Directing

that upon the inhabitants in general lodging their arms in Faneuil Hall, or any other convenient place, under the care of the selectmen, marked with the names of the respective owners, that all such inhabitants as are inclined, may depart from the town . . . . and that the arms aforesaid at a suitable time would be return’d to the owners.


166. James Thacher, A Military Journal During the American Revolutionary War, from 1775 to 1783, at 35 (Boston, Cottons & Barnard 1827).

(bayonets attached to the long guns), and “38 blunderbusses”
(short-barreled shotguns).  

Based on an estimate of 15,000 Bostonians, there was one
gun surrendered for every 5.6 residents. Historian Page Smith
estimates the Boston population to have been somewhat
higher. Still, he concludes that the surrendered guns “were a
very substantial armory for a city of some 16,000, many of whom
were women and children.” If we take into account those
weapons that had already been taken out of the city by Patriots,
it is probably not far off the mark to say that “every other male
Bostonian over the age of eighteen possessed some type of
firearm.” These estimates do not, of course, take into account
any firearms that the Bostonians secreted away or otherwise
refused to surrender.

Having collected the arms, Gage then refused to allow the
Bostonians to leave. He claimed that many more arms had
been secreted away than surrendered. Indeed, a large proportion
of the surrendered guns were “training arms”—large muskets
with bayonets that would be difficult to hide. Eventually, a
system of passes was set up, allowing Bostonians to leave town.
But the passes were difficult to obtain, and even then,
Bostonians were often prohibited from taking their household
goods or food. After several months, food shortages in Boston
convinced Gage to allow easier emigration from the city.

Gage’s Boston disarmament program incited other
Americans to take up arms. Benjamin Franklin, returning to
Philadelphia after an unsuccessful diplomatic trip to London,
“was highly pleased to find the Americans arming and preparing
for the worst events, against which he thinks our spirited

168. Frothingham, supra note 165, at 95.
169. Douglas Southall Freeman, 3 George Washington: A Biography
576 n.161 (1951).
170. Page Smith, 1 A New Age Now Begins: A People’s History of the
171. Id.
172. Id.
173. Thacher, supra note 166, at 35.
exertions will be the only means under God to secure us.”

A letter on behalf of the Massachusetts Provincial Congress warned the Provincial Congress of New York of:

[T]he breach of a most solemn treaty with respect to the inhabitants of Boston when they had surrendered their arms and put themselves wholly in the power of a military commander. [New Yorkers should avail] yourselves of every article which our enemies can improve with the least advantage to themselves for effecting the like desolation, horrors and insults on the inhabitants of your city and Colony, or which might enable you to make the most effectual defence. . . If you should delay securing them until they should be out of your power, and within a few days you should behold these very materials improved in murdering you, and yourselves perishing for the want of them, will not the chagrin and regret be intolerable.

The government in London dispatched more troops and three more generals to America—William Howe, Henry Clinton, and John Burgoyne. The generals arrived on May 25, 1775, with orders from Lord Dartmouth:

That all Cannon, Small Arms, and other military Stores of every kind that may be either in any public Magazine, or secretly collected together for the purpose of aiding Rebellions, should also be seized and secured, and that the persons of all such as, according to the Opinions of His Majesty’s Attorney and Solicitor General, have committed themselves in Acts of Treason & Rebellion, should be arrested & imprisoned.

Per Dartmouth’s orders, Gage imposed martial law on June 1775.
12 and offered a general pardon to all rebels; except for Samuel Adams and John Hancock, provided they would immediately desist and submit. The Americans declined.

The war underway, Americans continued to show their skill at arms. They captured Fort Ticonderoga in upstate New York. At the June 17, 1775, Battle of Bunker Hill, the militia held their ground against the British regulars and inflicted heavy casualties, until they ran out of gunpowder and were finally

179. The declaration of martial law by a general or a governor, rather than by a legislature, was itself considered illegal, and another justification for revolution. As U.S. Supreme Court Justice Levi Woodbury later recounted:

In the Annual Register for 1775, p. 133, June 12th, it may be seen that General Gage issued his proclamation, pardoning all who would submit, except Samuel Adams and John Hancock, and further declaring, “that, as a stop was put to the due course of justice, martial law should take place till the laws were restored to their due efficacy.”

Though the engagements at Lexington and Concord happened on the 19th of April, 1775, though Parliament had in February previous declared the Colonies to be in a state of rebellion, and though thousands of militia had assembled near Bunker Hill before the 12th of June, no martial law had been established by Parliament, and not till that day did General Gage, alone and unconstitutionally, undertake, in the language of our fathers, to “supersede the course of the common law, and, instead thereof, to publish and order the use and exercise of martial law.”

Another of these outrages was by Lord Dunmore, in Virginia, November 7th, 1775, not only declaring all the slaves of rebels free, but “declaring martial law to be enforced throughout this Colony.” This was, however, justly denounced by the Virginia Assembly as an “assumed power,” which the king himself cannot exercise,” as it “annuls the law of the land and introduces the most execrable of all systems, martial law.” It was a return to the unbridled despotism of the Tudors, which, as already shown, one to two hundred years before, had been accustomed, in peace as well as war, to try not only soldiers under it, but others, and by courts-martial rather than civil tribunals, and by no settled laws instead of the municipal code, and for civil offences no less than military ones.


181. Cannons from Fort Ticonderoga were hauled down to Boston. George Washington’s deployment of those cannons outside Boston in 1776 forced Gage to evacuate his troops from Boston without a fight. ALLISON, supra note 17, at 27.
driven back. Had Gage not confiscated the gunpowder from the Charleston Powder House the previous September, the Battle of Bunker Hill probably would have resulted in an outright defeat of the British. General Gage acknowledged that the Americans were not mere rabble. He asked London for more troops and mercenaries.

On June 19, Gage renewed his demand that the Bostonians surrender their arms, and he declared that anyone found in possession of arms would be deemed guilty of treason.

Meanwhile, the Continental Congress had voted to send ten companies of riflemen from Pennsylvania, Maryland, and Virginia to aid the Massachusetts militia.

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182. See French, supra note 49, at 62.
183. Id.
184. Id.
185. Proclamation by Governor Thomas Gage (June 19, 1775), available at http://www.lincoln.lib.niu.edu/cgi-bin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.3851. The proclamation stated:

Whereas, notwithstanding the repeated assurances of the Selectmen and others, that all the inhabitants of the town of Boston had bona fide delivered their Fire–Arms unto the persons appointed to receive them, though I had advices at the same time of the contrary; and whereas I have since had full proof that many had been perfidious in this respect, and have secreted great numbers; I have thought fit to issue this Proclamation, to require of all persons who have yet Fire–Arms in their possession immediately to surrender them at the Court–House, to such persons as shall be authorized to receive them; and hereby to declare that all persons in whose possession any fire arms may hereafter be found, will be deemed enemies to His Majesty’s Government.

Id.

General Gage promised to return the Bostonians’ guns if they gave him temporary custody of them. In 1972, the Provisional Irish Republican Army was waging a terrorist campaign in Northern Ireland—which is part of the United Kingdom. The PIRA was arming itself in part by stealing guns from registered gun owners in the independent Republic of Ireland, to the south. The Republic’s legislature enacted a temporary custody order, which required the surrender of certain types of firearms for a thirty day period when a person’s license for that gun expired. (Licenses were for a term of years, not lifetime.) The police then kept the guns, and refused to renew the licenses. The guns remained in police custody for thirty-four years, until a High Court lawsuit forced their return.

186. See Letter from John Hancock to Elbridge Gerry, in 1 Letters of Members of the Continental Congress 135 (Edmund C. Burnett ed., 1921).
B. Declaration of Causes and Necessity of Taking up Arms

On July 6, 1775, the Continental Congress adopted the Declaration of Causes and Necessity of Taking Up Arms. The Declaration was written by Thomas Jefferson and the great Pennsylvania lawyer John Dickinson. Among the grievances were General Gage’s efforts to disarm the people of Lexington, Concord, and Boston.

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187. See John Dickinson, The Declaration by the Representatives of the United Colonies of North America (July 6, 1775), in 2 The Political Writings of John Dickinson, Esquire, Late President of the State of Delaware, and of the Commonwealth of Pennsylvania 38–43 (Wilmington, Del., Bonsal & Niles 1801).
188. Id.
189. Id.

Soon after intelligence of these proceedings [a new British tax plan] arrived on this Continent, general Gage who in the course of the last year had taken possession of the town of Boston, in the Province of Massachusetts-Bay, and still occupied it as a garrison, on the 19th day of April sent out from that place a large detachment of his army, who made an unprovoked assault on the inhabitants of the said Province, at the Town of Lexington, as appears by the affidavits of a great number of persons, some of whom were officers and soldiers of that detachment, murdered eight of the inhabitants, and wounded many others. From thence the troops proceeded in warlike array to the Town of Concord, where they set upon another party of the inhabitants of the same province, killing several and wounding more, until compelled to retreat by the country people suddenly assembled to repel this cruel aggression. Hostilities, thus commenced by the British Troops, have been since prosecuted by them without regard to faith or reputation.—The inhabitants of Boston, being confined within that town by the general their governour, and having, in order to procure their dismission, entered into a treaty with him, it was stipulated that the said inhabitants having deposited their arms with their own magistrates, should have liberty to depart, taking with them their other effects. They accordingly delivered up their arms, but in open violation of honour, in defiance of the obligation of treaties, which even savage nations esteemed sacred, the governour ordered the arms deposited as aforesaid, that they might be preserved for their owners, to be seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave their most valuable effects behind.

By this perfidy, wives are separated from their husbands, children from their parents, the aged and the sick from their relations and friends, who wish to attend and comfort them; and those who have been used to live in plenty, and even elegance, are reduced to
In an earlier draft, Dickinson had written that “the Governor ordered the Arms deposited as aforesaid that they might be preserved for their Owners, to be seized by a Body of soldiers . . . .”\textsuperscript{190} Drafts by Jefferson complained that “their arms . . . deposited with their own magistrates to be preserved as their property were immediately seised by a body of armed men under deplorable distress . . . .

Our cause is just. Our union is perfect. Our internal resources are great, and, if necessary, foreign assistance is undoubtedly attainable.—We gratefully acknowledge, as signal instances of the Divine favour towards us, that His providence would not permit us to be called into this severe controversy until we were grown up to our present strength, had been previously exercised in warlike operations, and possessed of the means of defending ourselves. With hearts fortified with these animating reflections, we most solemnly, before God and the world, DECLARE, that, exerting the utmost energy of those powers which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverance, employ for the preservation of our liberties; being, with one mind, resolved to die freemen rather than live slaves.

We have not raised armies with ambitious designs of separating from Great–Britain, and establishing independent states. We fight not for glory or for conquest. We exhibit to mankind the remarkable spectacle of a people attacked by unprovoked enemies, without any imputation or even suspicion of offence.—They boast of their privileges and civilization, and yet proffer no milder conditions than servitude or death.

In our own native land, in defence of the freedom that is our birth-right, and which we ever enjoyed till the late violation of it—for the protection of our property, acquired solely by the honest industry of our forefathers and ourselves, against violence actually offered, we have taken up arms. We shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before.

With an humble confidence in the mercies of the supreme and impartial Judge and Ruler of the universe, we most devoutly implore his divine goodness to protect us happily through this great conflict, to dispose our adversaries to reconciliation on reasonable terms, and thereby to relieve the empire from the calamities of civil war.

\textit{Id.}

\textsuperscript{190} 2 \textsc{Journals of the Continental Congress: 1774–1789}, at 151 (1905).
orders from the [said General].”

On July 8, the Continental Congress followed up with an open letter to the people of Great Britain complaining that “your Ministers (equal Foes to British and American freedom) have added to their former Oppressions an Attempt to reduce us by the Sword to a base and abject submission.” As a result:

On the Sword, therefore, we are compelled to rely for Protection. Should Victory declare in your Favour, yet Men trained to Arms from their Infancy, and animated by the Love of Liberty, will afford neither a cheap or easy Conquest. Of this at least we are assured, that our Struggle will be glorious, our Success certain; since even in Death we shall find that Freedom which in Life you forbid us to enjoy.

One observer pressed the patriots’ cause in a publication that commented on the American gun culture. John Zubly, an immigrant from Switzerland who was serving as a Georgia delegate to the Continental Congress, wrote a pamphlet entitled The Law of Liberty, which was published in London and Philadelphia. It excoriated Gage for “[d]etaining the inhabitants of Boston, after they had, in dependance on the General’s word of honour, given up their arms, to be starved and ruined . . .” He warned that “in a strong sense of liberty, and the use of fire-arms almost from the cradle, the Americans have vastly the advantage over men of their rank almost every where else.” Indeed, children were “shouldering the resemblance of a gun before they are well able to walk.” “The Americans will fight like men, who have every thing at stake,” and their motto was “DEATH OR FREEDOM.” The town of Gorham, Massachusetts (now part of the state of Maine), sent the British

191. Id. at 136.
192. Id. at 169.
193. Id.
195. Id.
196. Id. at 12.
197. Id. at 14.
198. Id.
199. Id.
government a warning that even “many of our Women have been used to handle the Cartridge, and load the Musquet . . .”200

It was feared that the Massachusetts gun confiscation was the prototype for confiscation throughout America. For example, according to a newspaper article published in three colonies:

It is reported, that on the landing of the General Officers, who have sailed for America, a proclamation will be published throughout the provinces, inviting the Americans to deliver up their arms by a certain stipulated day; and that such of the colonists as are afterwards proved to carry arms shall be deemed rebels, and be punished accordingly.201

C. The Independent Militia Spread

Independent militia had been forming before Lexington and Concord, but the events of April 19 convinced many more Americans to arm themselves and to embody militia independent of royal control.202 A report from New York City observed that “the Inhabitants . . . [have] seized the city arms . . . ; have taken the keys of the Custom House by military force; [and] shut up the port.”203 Further, “the whole city and province are subscribing an association, forming companies, and taking every method to defend our rights. The like spirit prevails in the province of New Jersey, where a large and well disciplined militia are now fit for action.”204 The New York General Committee (a Patriot organization) resolved “that it be Recommended to every Inhabitant, to perfect himself in Military Discipline, and be provided with Arms, Accoutrements, and Ammunition, as by Law directed.”205

200. BROWN, supra note 6, at 118 (containing the letter of Jan. 7, 1773).
201. London, April 24, Va. GAZETTE, June 24, 1775, at 1 (also published in New York Journal on the same date, and in the Maryland Gazette on July 20).
202. See ALLISON, supra note 17, at 21 (discussing John Adams’ call for Congress to adopt the militiamen around Boston as a Continental Army after the events at Lexington and Concord).
205. 2 THE MEMORIAL HISTORY OF THE CITY OF NEW-YORK 482 (James G.
General Gage sent the news to London: “[Massachusetts], Connecticut, and Rhode Island are in open Rebellion and I expect the same Accounts of New-Hampshire. They are arming at New-York and as we are told, in Philadelphia, and all the Southern Provinces . . . .”

In Virginia, Lord Dunmore already knew the trouble that Patrick Henry’s independent militia could cause. Henry’s example was being copied everywhere: “Every County is now Arming a Company of men whom they call an independent Company for the avowed purpose of protecting their Committee, and to be employed against Government if occasion require.” Henry’s militia seized the public arms in Williamsburg.

North Carolina’s Royal Governor, Josiah Martin, issued a proclamation against “endeavouring to engage the People to subscribe papers obliging themselves to be prepared with Arms, to array themselves in companies, and to submit to the illegal and usurped authorities of Committees.” Martin complained that “[t]he Inhabitants of this County on the Sea Coast are . . . arming men, electing officers and so forth. In this little Town [New Bern] they are now actually endeavoring to form what they call independent Companies under my nose . . . .”

North Carolina’s three delegates to the Continental Congress sent a message to the Committees of Safety (local Patriot organizations) declaring:

It is the Right of every English Subject to be prepared with Weapons for his Defense. We conjure you . . . to form

208. Id. at 65.
209. See Williamsburg, May 6, VA. GAZETTE, May 6, 1775, at 3.
211. Id. at 362.
212. The delegation consisted of Richard Caswell, William Hooper, and Joseph Hewes.
yourselves into a Militia. . . . Carefully preserve the small Quantity of Gunpowder which you have amongst you, it will be the last Resource when every other Means of Safety fails you; Great-Britain has cut you off from further supplies . . . . We cannot conclude without urging again to you the necessity of arming and instructing yourselves, to be in Readiness to defend yourselves against any Violence that may be exerted against your Persons and Properties.\(^{213}\)

Furious, Governor Martin issued a “Fiery Proclamation” condemning the attempt “to excite the people of North Carolina to usurp the prerogative of the Crown by forming a Militia and appointing officers thereto and finally to take up arms against the King and His Government.”\(^{214}\) Independent militia were banned, and Martin declared that “persons who hath or have presumed to array the Militia and to assemble men in Arms within this Province without my Commission or Authority have invaded His Majesty’s just and Royal Prerogative and violated the Laws of their Country to which they will be answerable for the same.”\(^{215}\)

A Virginia gentleman wrote a letter to a Scottish friend explaining what was happening in America:

> We are all in arms, exercising and training old and young to the use of the gun. No person goes abroad without his sword, or gun, or pistols . . . . Every plain is full of armed men, who all wear a hunting shirt, on the left breast of which are sewed, in very legible letters, “\textit{Liberty or Death}.”\(^{216}\)

**D. Falmouth Destroyed**

In the summer of 1775, Lord Dartmouth relieved General Gage of his American command, replacing him with General

\(^{213}\) William Hooper, et al., \textit{To the Committees of the Several Towns and Counties of the Province of North Carolina}, N.C. GAZETTE, July 7, 1775, at 2.


\(^{215}\) \textit{Id.}

Howe. This was no gesture of conciliation. Americans’ refusal to surrender their firearms now prompted a different response. Royal Admiral Samuel Graves ordered that all seaports north of Boston be burned.

When the British navy showed up at Falmouth, Massachusetts (today’s Portland, Maine), the town attempted to negotiate. British “Captain Mowat informed the Committee at Falmouth, there had arrived orders from England, about ten days since, to burn all the seaport Towns on the Continent, that would not lay down and deliver up their arms, and give hostages for their future good behaviour.” Falmouth would avoid destruction only if “we would send off four carriage guns deliver up all our small arms, ammunition & c. and send four gentlemen of the town as hostages, which the town would not do.” The townspeople gave up eight muskets, which was hardly sufficient, and so Falmouth was destroyed by naval bombardment.

George Washington (whom the Continental Congress had recently appointed Major General and Commander-in-Chief of the just-created Continental Army on June 14), urged colonial newspapers to print stories on the destruction, highlighting British brutality.

The next year, the thirteen colonies would adopt the Declaration of Independence. The Declaration listed the tyrannical acts of King George III, including his methods for carrying out gun control: “He has plundered our seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our

217. ALLISON, supra note 17, at 22.
218. FISCHER, supra note 46, at 284.
219. Maine was split from Massachusetts in the Compromise of 1820.
221. Id.
222. Cannons mounted on a wheeled carriage, so that they can be moved from place to place.
224. Id.
225. See N.Y.J., Nov. 2, 1775, at 3; Letter from George Washington to Esek Hopkins (Oct. 21, 1775), in 6 REVOLUTIONARY CORRESPONDENCE FROM 1775 TO 1782, at 132 (1867).
IV. EPILOGUES

The British never lost sight of the fact that without their gun control program, they could never control America. In 1777, with British victory seeming likely, Colonial Undersecretary William Knox drafted a plan entitled “What Is Fit to Be Done with America?”227 The plan aimed to ensure that there would be no future rebellions.228 It provided that the Church of England would be established in every one of the thirteen colonies as the state church.229 Parliament would have power to tax within America.230 A hereditary aristocracy would be established.231 There would be a permanent standing army, and

The Militia Laws should be repealed and none suffered to be re-enacted, [and] the Arms of all the People should be taken away . . . nor should any Foundery or manufactory of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence . . . .232

The first Congress under the 1789 U.S. Constitution enacted a comprehensive tariff, with taxes of up to 12.5% on some goods; ten percent on certain other goods, including gunpowder, printing paper, writing paper, and unbound books; at five percent on everything else.233

After the Revolution, independent or semi-independent

226. The Declaration of Independence (U.S. 1776).
228. Id.
229. Id.
230. Id. at 146.
231. Id.
232. Id. at 176.
233. There were also taxes specified at a particular amount, rather than an ad valorem percentage, on many other goods, 1 Stat. 24 (1789). The Hamilton Tariff was the second law enacted by the new Congress.
militia became an accepted feature of American life.\textsuperscript{234} The federal Militia Act of 1792 recognized independent militia, and incorporated them into the federal militia:

\begin{quote}
And whereas sundry corps of artillery, cavalry and infantry now exist in several of the said states, which by the laws, customs, or usages thereof have not been incorporated with, or subject to the general regulation of the militia.

Sec. 11. Be it further enacted, That such corps retain their accustomed privileges, subject, nevertheless, to all other duties required by this act, in like manner with the other militia.\textsuperscript{235}
\end{quote}

After the end of the War of 1812, most states did little to train their militia.\textsuperscript{236} Accordingly, some civic-minded men founded new volunteer militia organizations.\textsuperscript{237} The movement started in the 1830s.\textsuperscript{238} By 1850 it had expanded nationwide.\textsuperscript{239} Typically, these independent militia would receive a corporate charter from the state, and the Governor would issue commissions to the officers.\textsuperscript{240} Some of the militia organizations were purely local, while others had chapters in several states.\textsuperscript{241} The quality of training varied widely.\textsuperscript{242} Some companies sported fancy uniforms and excelled in complicated marches.\textsuperscript{243} But few developed much skill in combat shooting or tactics.\textsuperscript{244} Mass enlistments from the volunteer militia filled the ranks of the U.S. Army during the Mexican-American War (1846–1848), and these volunteers at least had more military training than raw recruits.\textsuperscript{245} In the chaotic early days of the American Civil War


\textsuperscript{235} 1 Stat. 271 (1792).

\textsuperscript{236} Cunliffe, supra note 234, at 205–12.

\textsuperscript{237} See generally Jerry M. Cooper, The Rise of the National Guard: The Evolution of the American Militia: 1865–1920 (2002); Cunliffe, supra note 234.

\textsuperscript{238} Cunliffe, supra note 234, at 205–12.

\textsuperscript{239} Id.

\textsuperscript{240} Id.

\textsuperscript{241} Id.

\textsuperscript{242} Id.

\textsuperscript{243} Id.

\textsuperscript{244} Id.

\textsuperscript{245} Id.
(1861–1865), volunteer militia saved Washington, D.C. from Confederate conquest.246 The National Guard, which first arose in some states near the end of the Civil War, was in its earliest incarnations an independent militia.247 However, the Guard eventually traded independence for state and then federal funding, and today is almost entirely under the control of the federal Department of Defense.248

The Posse Comitatus Act was enacted in 1878, forbidding use of the Army in domestic law enforcement, and providing a formal rule against one of the practices that had spurred the Revolution.249 However, beginning in 1981, enormous loopholes were created in the Posse Comitatus Act, allowing extensive military participation in domestic enforcement of drug laws.250 Among the consequences was military participation in the deadly attack on the Branch Davidian compound at Waco, Texas, in February 1993, which had the purported purpose of enforcing federal laws against the untaxed manufacture of machine guns.251

V. SOME LESSONS FOR TODAY

To the Americans of the Revolution and the Founding Era, the late twentieth century claim that the Second Amendment is a collective right and not an individual right might have seemed incomprehensible. The Americans owned guns individually, in their homes. They owned guns collectively, in their town armories and powder houses. They would not allow the British to confiscate their individual arms, or their collective arms; and when the British tried to do both, the Revolution began. The Americans used their individual arms and their collective arms to fight against the confiscation of any arms. Americans fought to

246. Id.
247. Id.
248. See COOPER, supra note 237, at 11–22.
251. See generally DAVID B. KOPEL & PAUL H. BLACKMAN, NO MORE WACOS: WHAT’S WRONG WITH FEDERAL LAW ENFORCEMENT AND HOW TO FIX IT (1997).
provide themselves a government that would never perpetrate the abuses that had provoked the Revolution.

What are modern versions of such abuses? The reaction against the 1774 import ban for firearms and gunpowder (via a discretionary licensing law) indicates that import restrictions are unconstitutional if their purpose is to make it more difficult for Americans to possess guns. Conversely, the 1789 Tariff Act shows that moderate taxes, such as a protective tariff of ten percent, may be applied to arms or ammunition, and that one legitimate purpose of tariffs is to foster the health of the American firearms industry. The federal Gun Control Act of 1968 prohibits the import of any firearm which is not deemed suitable for “sporting” purposes by federal regulators. That import ban seems difficult to justify based on the historical record of 1774–1776, or on District of Columbia v. Heller and McDonald v. City of Chicago, both of which hold that, while sporting uses such as hunting are part of the Second Amendment, the “core” and “central component” of the Second Amendment is self-defense.

Laws which attempt to disarm people who have proven themselves to be a particular threat to public safety are not implicated by the 1774–1776 experience. In contrast, laws which aim to disarm the public at large are precisely what turned a political argument into the American Revolution. Sometimes, legislative history will frankly reveal that the purpose of an anti-gun law was to discourage gun ownership in general, or that the law was based on hostility to gun ownership. This is the case for New York City’s pistol licensing fees. Everywhere in New

252. See 1 Stat. 24 (1789).
256. Id.
York State, the fee for the issuance or revision of a handgun permit is ten dollars (plus a separate ninety-five dollar fee for a fingerprint check for first-time applications). But in New York City, the fee is over $340, payable every three years. The explicitly stated purpose of allowing the New York City government to charge extra fees was to discourage handgun ownership in the City.

In Alameda County, California, the five-person county board of supervisors banned gun shows on county property at the behest of a supervisor who complained that her previous efforts to ban gun shows had “gotten the run around from spineless people hiding behind the constitution.” She explained that the county should not “provide a place for people to display guns for worship as deities for the collectors who treat them as icons of patriotism.” Nevertheless, the Ninth Circuit upheld the ban because the other supervisors who voted for the ordinance might have had legitimate motives. (Supposedly, banning gun shows on county property would prevent violence on county property, although there was and is not a shred of evidence of supporting fears of violence at gun shows.)

Generally speaking, courts tend to be highly sensitive to evidence of illicit motives in cases alleging violation of the Equal Protection Clause’s ban on racial discrimination, but not in other cases. Given that the Constitution does not establish a hierarchy between enumerated rights, it is difficult to see why

257. Id.
258. Id.
259. Id. at 7–8.
260. Nordyke v. King, 563 F.3d 439, 443 (9th Cir. 2009).
261. Id.
262. Id. at 463.
264. See Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S. 464, 484 (1982) (Rejecting the idea that different parts of the Constitution deserve different degrees of judicial protection. Rather, “[e]ach establishes a norm of conduct which the Federal Government is bound to honor—to no greater or lesser extent than any other inscribed in the Constitution . . . . [W]e know of no principled basis on which to create a hierarchy of constitutional values . . . .”).
a legislator’s explicit and illicit purpose to deny constitutional rights—especially the rights whose similar denial led to the American Revolution—should be irrelevant to judicial review. In heightened scrutiny, the actual (not purported, or post-hoc) purpose of the legislation is a fact of the greatest importance.

The most important lesson for today from the Revolution is about militaristic or violent search and seizure in the name of disarmament. As Hurricane Katrina bore down on Louisiana, police officers in St. Charles Parish confiscated firearms from people who were attempting to flee. As Hurricane Katrina bore down on Louisiana, police officers in St. Charles Parish confiscated firearms from people who were attempting to flee.\textsuperscript{265} After the hurricane passed, officers went house-to-house in New Orleans, breaking into homes and confiscating firearms at gunpoint.\textsuperscript{266} The firearms seizures were flagrantly illegal; the Louisiana state emergency law at the time had a provision allowing, after a formal declaration by the appropriate official, government action to “prohibit” some items (such as alcohol) and to “control” other items (such as firearms).\textsuperscript{267} The emergency powers were never invoked, and even if they had been, they did not authorize gun prohibition.\textsuperscript{268} A federal district judge properly issued an order finding the gun confiscation to be illegal.\textsuperscript{269} Eventually, local governments accepted a Consent Decree ordering them to return the illegally-taken firearms.\textsuperscript{270} St. Charles has complied with the


\textsuperscript{266} \textit{Id.}

\textsuperscript{267} \textsc{La. Rev. Stat. Ann.} § 14:329.6 (2005) (allowing the “regulating and controlling” but not the “prohibiting” of firearms and ammunition in emergencies, following appropriate official notices and declarations, none of which were made); David Kopel, \textit{New Orleans Gun Confiscation is Blatantly Illegal}, \textsc{The Volokh Conspiracy} (Sept. 9, 2005, 9:57 PM), http://www.volokh.com/archives/archive_2005_09_04-2005_09_10.shtml#1126317466.

\textsuperscript{268} See Kopel, \textit{supra} note 267.

\textsuperscript{269} Consent Order, \textsc{Nat’l Rifle Ass’n v. Nagin}, No. 05-20,000 A (E.D. La., Sept. 23, 2005) (temporary injunction based on violation of the Second Amendment and other constitutional rights; defendants denied confiscating guns), \textit{available at} http://www.stephenhalbrook.com/lawsuits/nagin-order.pdf.

\textsuperscript{270} Consent Order Granting Permanent Injunction and Dismissal of Remaining Claims Against Defendants, C. Ray Nagin and Warren Riley, \textsc{Nat’l Rifle Ass’n v. Nagin}, No. 05-4234 J (2) (E.D. La., Oct. 9, 2008) (ordering
Decree, while New Orleans continues to defy it.\textsuperscript{271}

A vigorously-enforced Fourth Amendment might be sufficient to provide all the necessary protection against such abuses in modern times. But the Fourth Amendment has been one of the casualties in the war on drug users, and police militarization has been one of the war’s consequences.\textsuperscript{272} Even so, courts should be especially vigilant in policing the use of violence or militarism in the course of searches and seizures relating to items whose possession is a core American freedom. The Bill of Rights provides special protection to two types of manmade tools which the Founders believed that people had a natural right to possess and use: printing presses and firearms.\textsuperscript{273} Certainly books, newspapers, other reading materials (including electronic ones), and religious objects, are also within a zone of special constitutional protection.\textsuperscript{274}

When there is genuine evidence of potential danger—such as evidence that guns are in the possession of a violent gang—then the Fourth Amendment properly allows no-knock raids, flash-bang grenades, and similar violent tactics to carry out a search.\textsuperscript{275} Conversely, if there is no real evidence of danger—for example, if it is believed that a person who has no record of violence owns guns but has not registered them properly—then militaristically violent enforcement of a search warrant should never be allowed. Gun ownership \textit{simpliciter} ought never be a pretext for government violence. The Americans in 1775 fought a

defendants to return the firearms they had confiscated), \textit{available at} http://www.stephenhalbrook.com/lawsuits/Consent_Order_Final_NRA-Nagin.pdf.

\textsuperscript{271} Hutchinson & Masson, supra note 265; Halbrook New Orleans, supra note 265.


\textsuperscript{274} See U.S. CONST. amend. I.

\textsuperscript{275} See Richards v. Wisconsin, 520 U.S. 385, 394 (1997).
war because the king did not agree. Americans of the twenty-first century should not squander the heritage of constitutional liberty bequeathed by the Patriots.
TROY DAVIS, LAWRENCE BREWER, AND TIMOTHY MCVEIGH SHOULD STILL BE ALIVE: CERTAINTY, INNOCENCE, AND THE HIGH COST OF DEATH AND IMMORALITY

Patrick S. Metze*

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I. INTRODUCTION

Since September 21, 2011, I have read news accounts and blogs about the executions of Troy Davis in Georgia and Lawrence Brewer in Texas.1 Being actively involved in death penalty defense and scholarship, I have struggled with the question of whether I should be equally offended by both executions. My gut tells me yes, but the arguments I read give me pause. Should I not have an equal reaction to the capital punishment dealt to each of these men? The uncertainty of Troy Davis’s guilt and the cold, intellectual way the courts turned from his cause seems wrong. However, the speed with which I

* Associate Professor of Law, Director of Criminal Clinics (Criminal Defense Clinic, Capital Punishment Clinic and Caprock Regional Public Defender Clinic) at Texas Tech University School of Law; B.A. Texas Tech University 1970; J.D. The University of Houston 1973. Special thanks to my research assistant, Zack Allen, for his intellect and patience.
assume the correctness of Brewer’s guilt is concerning. In both cases, it is not their guilt, whether confessed or contested, that is bothersome. Neither the record in Davis nor in Brewer is troubling, should a fact finder see them as a party to the murder of their victim. Nevertheless, I must reconcile my emotional responses to the executions of Troy Brown and Lawrence Brewer, less I tacitly approve of Brewer’s death.

As one conservative blogger said, “[U]ntil [death penalty opponents] can explain why we shouldn’t have a death penalty when uncertainty isn’t an issue—i.e., why McVeigh and Brewer should live—they’ll never win the real argument.” So certainty appears for some death penalty proponents to be the lynchpin by which they claim hypocrisy in the anti-death penalty community. Timothy McVeigh has been the poster-boy for society to address this issue for some time, and for those same protagonists, Lawrence Brewer was just as certainly guilty and unworthy of anything but a death sentence.

During McVeigh’s trial, his lawyers attempted to plead for a life sentence, but those efforts failed as their revolutionary approach fell on deaf ears. Because of doubt or uncertainty as to his guilt, Troy Davis died with the empathy of many. Because our society has lost its humanity, McVeigh and Brewer died with the stain of hatred. We should use these opportunities to maturely and critically analyze society’s love affair with the death penalty.

In an attempt to remove my personal bias from the discussion, this Article begins by making separate legal


3. Cf. United States v. McVeigh, 153 F.3d 1166, 1205–11 (10th Cir. 1998) (explaining how one of McVeigh’s arguments on appeal was his inability to effectively voir dire potential jurors regarding their views about automatically imposing the death penalty on a convicted murderer).

4. Richard Burr, Litigating With Victim Impact Testimony: The Serendipity That Has Come From Payne v. Tennessee, 88 CORNELL L. REV. 517 (2003). The new approach used in McVeigh’s trial was the use of defense-initiated victim outreach, also called defense-based survivor outreach, applying the principles of restorative justice developed by Tammy Krause and Dr. Howard Zehr. Id. at 527.
arguments as to why Davis and Brewer should not have been executed. Second, as I am challenged to argue why there should not be a death penalty, even when certainty is not an issue, I introduce our modern day pariah—Timothy McVeigh—into the argument. The Article closes with why murderers such as Lawrence Brewer and Timothy McVeigh should not have been executed—an argument that can be extended to all convicted of this crime, whether one is certain or uncertain of their “actual innocence” or “actual guilt.”

II. TROY DAVIS

Convicted of the shooting death of an off-duty police officer, Troy Davis maintained his innocence, and with his last breath said, “I’m not the one who personally killed your son, your father, your brother. I am innocent. The incident that happened that night is not my fault. I did not have a gun.” As part of a longer statement, these words made me stop and wonder. If one is engaged in a criminal enterprise where it can be anticipated that a death may occur, should one face the possibility of a death sentence when the worst-case scenario happens? The degree to which one should be held responsible is the question.

Certainly, the principle of holding one responsible for the acts of another has a long history in our jurisprudence. In Texas, not personally killing someone or not having the gun when fatal shots are fired does not prevent a death sentence. Similarly, in Georgia, party liability allows “[e]very person concerned in the


7. TEX. PENAL CODE ANN. § 7.01(c) (West 2003 & Supp. 2010) (“All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.”); see also Goff v. State, 931 S.W.2d 537, 544 (Tex. Crim. App. 1996). Consequently, the courts use the terms “party” and “accomplice” interchangeably. For a discussion of party responsibility in Texas, see Patrick S. Metze, Death and Texas: The Unevolved Model of Decency, 90 NEB. L. REV. 240 (2011).
commission of a crime” to be “charged with and convicted of commission of the crime.”\textsuperscript{8}

Most of the public furor over the execution of Troy Davis came from the recantation of seven of the State’s nine witnesses.\textsuperscript{9} Along with these witnesses, three jurors also indicated their doubt as to Davis’s guilt.\textsuperscript{10} It is the question of Davis’s innocence that is the key.

When is an accused person innocent of a crime? When does the accused lose that innocence, and if lost, is it possible to regain one’s innocence?

The concept of the presumption of innocence finds its origins in the laws of Sparta, Athens, and Rome, and restated in the English Common Law development during the eighteenth and nineteenth centuries.\textsuperscript{11} Along with this axiom is the frequent repetition of the concept, often attributed to Blackstone, that “it is better that ten guilty persons escape than that one innocent suffer.”\textsuperscript{12} “[T]his presumption [of innocence] is to be found in every code of law which has reason, and religion, and humanity, for a foundation.”\textsuperscript{13} The “presumption of innocence is evidence in favor of the accused introduced by the law in his behalf . . . .”\textsuperscript{14} Reasonable doubt “is the result of the proof, not the proof itself, whereas the presumption of innocence is one of the instruments of proof . . . one is a cause, the other an effect.”\textsuperscript{15} “The inevitable tendency to obscure the results of a truth, when the truth itself is

\textsuperscript{8} GA. CODE ANN. § 16-2-20 (2003); see also Smith v. State, 222 S.E.2d 308, 318 (Ga. 1976) (affirming death sentences for both a husband and wife wherein only the husband shot and killed the victims).


\textsuperscript{12} Id. at 456.

\textsuperscript{13} Id.

\textsuperscript{14} Id. at 460.

\textsuperscript{15} Id.
forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied” to the accused.\textsuperscript{16} The presumption is proof created by law—an infallible, omnipresent truth. If the proof leads to a finding of guilt beyond a reasonable doubt and the proof later becomes suspect, then the conclusion is suspect. The initial proof that the accused is presumed innocent cannot be rebutted except with credible evidence.\textsuperscript{17}

With the development of the English Common Law came the implementation of safeguards to prevent abuse. The introduction of quasi-professionals in the law—first as prosecutors and later defense counsel—the development of rules of evidence, the objectivity of the jury as impartial fact finder but not the inquisitor, codes of procedure, the presence of the accused at trial, the right to remain silent, and the right of the accused to be represented by counsel embodied in the Sixth all transformed western courts.\textsuperscript{18} Terms such as “beyond a reasonable doubt” began in the late eighteenth century to be used by courts in their instructions to their juries.\textsuperscript{19} Flowing from the presumption of

\textsuperscript{16} Id.

\textsuperscript{17} In his dissent from the denial of a petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit and the denial of an application for stay of execution of the sentence of death to the United States Supreme Court filed by Ernest John Dobbert, Jr., Justice Brennan, joined by Justice Marshall, said, “In the face of a specific recantation of critical testimony, a court must evaluate the recantation itself and explain what it is about that recantation that warrants a conclusion that it is not credible evidence.” Dobbert v. Wainwright, 468 U.S. 1231, 1235–36 (1984) (Brennan, J., dissenting).


\textsuperscript{19} Id. at 80. A search of Supreme Court cases from the nineteenth century shows the first use of “beyond a reasonable doubt” in a quasi-criminal case was in Chaffee & Co. v. United States, 85 U.S. 516 (1873), in an action for penalties in fraud of the internal revenue laws. In the case of Miles v. United States, 103 U.S. 304 (1880), an appeal of a bigamy conviction from the Territory of Utah, the Court first quotes the modern criminal standard:

The prisoner’s guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not
innocence, these rules of persuasion and proof were given to the fact finders as tools to aid reaching their conclusions.\textsuperscript{20}

In any trial, if the proof relied upon by the fact finder in finding guilt is not credible, then it follows that the result is faulty. As stated in \textit{Coffin v. United States}, the proof first introduced in all trials is for the benefit of the defendant—that he enjoys the presumption of innocence.\textsuperscript{21} If the remaining proof—in whole or in part—is untruthful, fabricated, unreliable or insufficient, it is thereby not credible.\textsuperscript{22} Evidence that lacks credibility should be disregarded and the remaining evidence considered—with evidence that the accused is presumed innocent always being present.

This is the travesty in Troy Davis’s case. Somehow our system has decided that a finding of guilt by a fact finder is the equivalent of hardening cement. Once it is set, it cannot be returned to its original form of sand, gravel and water. But why not? The law is not chemistry; it is a permanent fluid, developing and filling the voids of unfairness created by the mason. The accused is always innocent until the proof changes the perception and the accused is proven to be guilty. But once that proof is questioned, why must the accused then show his actual innocence?\textsuperscript{23} Troy Davis was convicted using seven witnesses to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant’s guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.

\textit{Id.} at 309 (internal quotation marks omitted). Until this time, beyond a reasonable doubt was strictly a civil standard in Supreme Court cases.

\textsuperscript{20} See Lemmings, supra note 18, at 79.

\textsuperscript{21} 156 U.S. 432, 433 (1895).

\textsuperscript{22} Black’s defines credible evidence as “evidence that is worthy of belief; trustworthy evidence.” \textsc{Black’s Law Dictionary} 636 (9th ed. 2009).

\textsuperscript{23} Following the affirmance of his conviction and death sentence and the denial of both state and federal habeas petitions, Davis filed an application to file a second or successive petition for writ of habeas corpus claiming, for the first time, his “actual innocence.” After a stay of execution, further briefing, and oral argument, this application was denied by the Eleventh Circuit. \textit{In re Davis}, 565 F.3d 810 (11th Cir. 2009). \textit{See generally} Schlup v. Delo, 513 U.S. 298, 324 (1995) (discussing the raising of a claim of “actual innocence” and avoiding procedural default). For a more thorough discussion of questioning the concept
whose credibility, either at trial or during habeas, were seriously brought into question. The use of the word “actual” to qualify the word “innocent” is a fiction of modern jurisprudence used to limit access to habeas process for those deemed “actually convicted.”

One accused is not “actually innocent” and should never have to show he is “actually innocent.” An accused is first presumed innocent. Where in our history is it left to the accused to prove anything? And when he does, is it not then the burden of the accuser to rebut that evidence?

It has been held that once afforded a fair trial, the convicted loses his presumption of innocence. But the convicted should be returned to his original status—innocent—if the evidence used to convict was untrue, fabricated, unreliable, or insufficient. To obtain federal habeas relief, the accused must show a violation of constitutional rights. But the standard of whether any rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt is incorrect. This burden places an unrealistic and impossible burden upon the convicted in habeas. The rule should not be any rational trier of fact but all rational triers of fact, and once a prima facie showing is made by the convicted, the accuser should have the burden. At the trial level it is not the responsibility of the accused to convince all jurors of his innocence, it is the burden of the accuser to prove to all jurors the accused’s guilt. To obtain relief through mistrial, the accused must only convince one. This is the proper standard. If the new evidence of the convicted’s guilt is of such a nature that it would convince one rational trier of fact that a reasonable doubt exists, then the convicted should receive a new trial. The presumption of innocence is a concept much more ancient than the common law and the development of modern trial rules and standards. This presumption is the foundation of our freedoms. It is not lost upon conviction, but placed in suspension during the execution of the sentence until such time as doubt can be cast on

of qualifying innocence with the term “actual,” see infra, Part IV.

the validity of the evidence used to convict.

That the execution of an innocent person would be a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment\textsuperscript{28} is as fundamental as the right to pursue life, liberty and happiness. For those that complain this procedure would create diminished reliability during the retrials,\textsuperscript{29} this burden is a small price to pay when passing on the accused’s liberty. Had the state not proffered such testimony the first time, the original trial would have benefited from the honest presentation of the evidence. Justice does not suffer when the state and the accused are offered a full and fair trial. For too long, the appellate courts have whitewashed the improper use of evidence by prosecutors and the trial court’s tacit acquiescence. The very integrity of the system dictates that if the state should be found to have cheated, the accused must be offered another trial with the state forced to use whatever truthful, reliable, and credible evidence is available and nothing else. Otherwise, it is best “that ten guilty persons escape than that one innocent suffer.”\textsuperscript{30} This is our history, this is our system. In my lifetime, appellate courts all too often have used procedure and perverted legal reasoning to uphold convictions. This must stop. Why use this actual innocence moniker?\textsuperscript{31} If the state had to prove the accused actually guilty then the burden of proof would be greater than beyond a reasonable doubt.\textsuperscript{32} At least with this “fundamental miscarriage of justice” exception the courts allow one to attempt to prove their innocence,\textsuperscript{33} even though it flies in


\textsuperscript{29} McCleskey v. Zant, 499 U.S. 467, 491 (1991).


\textsuperscript{31} Sawyer v. Whitley, 505 U.S. 333, 335 (1992).

\textsuperscript{32} Actually guilty would imply guilt beyond all doubt, as actual innocence requires proof of innocence beyond all doubt. Are children born actually innocent with the burden of proving themselves so?

\textsuperscript{33} McCleskey, 499 U.S. at 502. The Court uses a cause and prejudice analysis in procedural default cases. When a second or subsequent petition for a writ of habeas corpus is filed, if the government identifies claims that appear for the first time and alleges an abuse of the writ, petitioner must show cause

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the face of our traditions of burdens and standards of proof. But the courts say that just being innocent is insufficient, there must also be a constitutional claim to allow habeas relief. The Eighth Amendment prohibition against cruel and unusual punishment is a constitutional claim as is the protection of due process protected by the Fifth and Fourteenth Amendments. Due process requires the use of only truthful, reliable and sufficient evidence to obtain a conviction. It is our tradition that “the guilt or innocence determination in our system of criminal justice is made ‘with the high regard for truth that befits a decision affecting the life or death of a human being.’”

Courts will only find a state’s criminal process in violation of the Fourteenth Amendment’s guarantee of due process of law where the procedure “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” What principle of justice is more rooted in our traditions and conscience than the presumption of innocence, a fact put into evidence for the accused prior to any evidence of guilt? The grant of a new trial upon the discovery of new evidence has long been our tradition. Any court or legislatively made rule that limits the time by which an accused may challenge his conviction because of the state’s use of untruthful, fabricated, unreliable or insufficient evidence should be unconstitutional.

Justice Blackmun stated in his dissent in Herrera, “I think it

for failing to raise the claim and must also show prejudice therefrom. “If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.” Id. at 494–95 (emphasis added).

38. See id. (noting the amendment of Rule II(3), Criminal Rules of Practice and Procedure, codified at 18 U.S.C. § 688 (1940), to allow filing new trial motions at any time in capital cases prior to execution).
is crystal clear that the execution of an innocent person is ‘at odds with contemporary standards of fairness and decency.’”\(^{39}\) Courts cannot uphold a conviction when there is a probability that the convicted is not guilty. “[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .”\(^{40}\) The more restrictive Herrera standard requiring a clear and convincing showing of innocence in an error-free trial gives way to the probability of innocence standard when reviewing the conviction coupled with a constitutional claim.\(^{41}\)

This is an artificial judicial invention of standards and distinctions where none should exist. In short, if the state cheats, even unknowingly, the convicted has been denied an error-free trial and has been denied his rights guaranteed by the presumption of his innocence presented on his behalf by the law. If the convicted should be fortunate enough to be alive when the disputed new evidence is discovered, then an accused should be given the opportunity to clear his name. The prior execution of a sentence should be no bar whether the accused was convicted of a capital or non-capital crime.

In Schlup, the convicted in a habeas proceeding must show “more likely than not that no reasonable juror would have convicted him in the light of the new evidence” beyond a reasonable doubt.\(^{42}\) The standard should be that more likely than not one reasonable juror would not have found him guilty beyond a reasonable doubt. In our jurisprudence, only one juror is required to have a reasonable doubt to afford the accused a new trial. In a habeas proceeding, regardless of the corresponding constitutional claim, the standard should not change when the evidence used to convict is shown to be more likely than not untruthful, fabricated, unreliable, or insufficient.

\(^{39}\) Id. at 431 (Blackmun, J., dissenting) (quoting Spaziano v. Florida, 468 U.S. 447, 465 (1984)).

\(^{40}\) Id. at 436 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 848 (1992)) (internal quotation marks omitted).


\(^{42}\) Id. (emphasis added).
These rules are the epitome of an arbitrary and capricious application of constitutional principles and should be discarded.\(^43\)

Had Troy Davis been granted a new trial, he might well have been found guilty again, but our confidence in the jury’s finding would not be tainted by the smell of coerced and recanted testimony. As seven of the state’s nine witnesses recanted their testimony,\(^44\) this means seven of the state’s witnesses were untruthful either at trial or during habeas and their word is unusable at either stage. Being self-identified as untruthful, their testimony should have been excluded from a review of the remaining evidence and a determination of whether, more likely than not, a reasonable juror would not have found Troy Davis guilty beyond a reasonable doubt. In other words, is it probable that a reasonable juror would have had a reasonable doubt of Troy Davis’s guilt when hearing only the truthful, reliable, and credible evidence?

Upon retrial, should the prosecution have difficulty obtaining a conviction, then in the future, the state will be more thorough and precise in their investigation when required to offer testimony untainted by misconduct. One would hope the prosecutors in the Davis case were not privy to the misconduct which led seven witnesses to later recant. Convictions should never stand when there are serious concerns about the evidence presented to overcome the accused’s presumption of innocence. The accused—prior to conviction—and the convicted—when convicted upon untruthful, fabricated, unreliable or insufficient evidence—share one common fact. The convicted is still innocent, as he was when first accused, and should be afforded that presumption unless convicted upon proper, truthful, reliable and sufficient evidence. Otherwise, he should be set free. If there is a cloud over his conviction, the Constitution and our traditions demand the conviction be set aside.\(^45\)

\(^44\). See Lee, supra note 9 and accompanying text.
\(^45\). It is obvious now that clemency is not available to one who cannot prove himself actually innocent. To suggest, as in Herrera, that the accused must rely on clemency is to ignore the political reality. If clemency was not granted for Troy Davis, for whom will it be considered? See Herrera, 506 U.S. at 411–17; see also Earl Ofari Hutchinson, Why Obama Couldn’t Prevent the Troy
III. LAWRENCE BREWER

Not yet answering the conservative commentator that demanded an explanation as to why there should not be a death penalty when certainty of the conviction is not an issue, I now address Lawrence Brewer.46 Troy Davis on his deathbed told the family of slain Georgia police officer Mark MacPhail that he was innocent and asked God to bless the souls of those who were about to take his life and for God to have mercy on them.47 However, to most that would have supported Troy Davis, Lawrence Brewer was an unsympathetic person who said he would “do it all over again” with no regrets or remorse, while at the same time claiming to be innocent.48

Supported by an ex-president, former and current members of Congress and the Senate, a former director of the FBI, Pope Benedict XVI,49 Archbishop Desmond Tutu, and millions worldwide,50 the execution of Troy Davis “capped a sobering week of death penalty debate likely to play into shifting attitudes in the US over the ultimate sanction.”51 To contrast, some said there was no outrage over Lawrence Brewer’s execution the same


46. Lawrence Brewer was indicted, along with codefendants John William King and Shawn Allen Berry, for kidnapping James Byrd, Jr., chaining him to a pickup truck, and dragging him to his death in Jasper, Texas in 1998. See 3 Whites Indicted in Dragging Death of Black Man in Texas, CNN.COM (July 6, 1998 11:07 pm), http://www.cnn.com/US/9807/06/dragging.death.02/index.html. Brewer was convicted of capital murder, sentenced to death, and executed in Texas on September 21, 2011—the same day Troy Davis was executed in Georgia. See Lynch, supra note 1.

47. See Troy Davis Maintains Innocence, supra note 5 and accompanying text.


night as Troy Davis, and that Brewer was ignored. This is not true.

Famed civil rights activist Dick Gregory said, “When do the State qualify to kill somebody and the government qualify to kill somebody and it’s all right? . . . It’s never all right to kill somebody intentionally. There are people who kill people. They are not the State. They are not the government. I don’t pay taxes to them.”

Gregory continued, “I just don’t believe the state should have the right to kill people . . . If you put a man in jail for life, that’s punishment. When you start killing people, that’s revenge. It’s crazy and we let our government get by with it.” Lawrence Brewer was convicted and executed for helping kill James Byrd, Jr. by chaining him to the back of a pickup truck and dragging him to his death.

Ross Byrd, the victim’s son said, “You can’t fight murder with murder. Life in prison would have been fine . . . Life goes on[.]” Betty Boatner, James Byrd’s sister said,

“My parents taught us how to forgive . . . And so we forgave him . . . I had to forgive because if I didn’t, hate would eat me up just like it ate him up . . . And I refuse to live the life like that. Life is too precious to just be consumed with hate.”

56. Lee, supra note 9 and accompanying text.
57. Id.
Unlike Troy Davis, there was no lack of certainty as to Brewer’s involvement in Byrd’s death.59 Brewer perhaps did not understand, or was unable to admit his party involvement in Byrd’s death. It is arguable that Brewer’s codefendants were more actively involved in the act which took Byrd’s life, but this is not the question I have to raise. If uncertainty is the test, what uncertainly could there have been in Brewer’s conviction and death sentence?

Brewer was charged under the portion of section 19.03 of the Texas Penal Code that defines capital murder as follows: (1) “A person commits an offense [of capital murder] if the person commits murder as defined under Section 19.02(b)(1)”60 of the Texas Penal Code and (2) “the person intentionally commits the murder in the course of committing or attempting to commit kidnapping . . . ”61 All capital murder scenarios in Texas require either an intentional or knowing mens rea as to the murder associated with an aggravating factor except for when a person commits a capital murder in the course of committing or attempting to commit certain crimes which include kidnapping. In this case, the requisite mens rea as to the accompanying murder is restricted to intentional acts only.62 A proper insight into this particular Texas capital statute requires a thorough understanding of how the capital murder statute in Texas defines an intentional or knowing mens rea as to the requisite murder.

In section 6.03 of the Texas Penal Code, “[a] person acts intentionally, or with intent, with respect to the nature of his conduct [in this case murder] or to a result of his conduct [the intentional death of another] when it is his conscious objective or desire to engage in the conduct or cause the result.”63 By comparison,

60. Murder is defined in Texas as “intentionally or knowingly caus[ing] the death of an individual.” TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011).
61. Kidnapping is the intentional or knowing abduction of another person. Id. § 20.03.
62. See id. § 19.03(a)(2).
63. Id. § 6.03(a).
[a] person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.64

Consequently, Texas Penal Code section 6.03 defines three conduct elements which may be involved in an [intentional or knowing] offense: (1) the nature of the conduct, (2) the result of the conduct, and (3) the circumstances surrounding the conduct. The statutory definition of intentional culpability requires the person accused to have the conscious objective or desire (1) to engage in the illegal conduct (nature of conduct) or (2) to cause the result of that conduct (result of conduct), while knowing culpability requires the person to be aware (1) of the criminal nature of his conduct (nature of conduct), (2) the circumstances surrounding his criminal conduct (circumstances surrounding conduct) or (3) that his criminal conduct is reasonably certain to cause the result (result of conduct).65

In Brewer’s situation, if it is shown that he and his codefendants knowingly caused the death of Byrd, without a conscious desire to cause the death, while committing or attempting to commit kidnapping, a crime specifically enumerated in section 19.03(a)(2) of the Texas Penal Code,66 Brewer cannot be guilty of capital murder, only the lesser included offense of murder as defined in section 19.02 of the Texas Penal Code.67 If one ties a logging chain around another to

64. Id. § 6.03(b).
66. TEX. PENAL CODE ANN. § 19.03(a)(2) (West 2011). The underlying crimes being: kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat. Id. §22.07(a)(1), (3)–(6).
drag them behind a vehicle, certainly that person should be aware that regarding this conduct and these circumstances, it is reasonably certain that the action would cause the resulting death of the one dragged. This is the textbook definition of a knowing murder.

I did not read the transcript of the trial, but none of the accounts I have seen indicate Brewer or his codefendants, when they dragged Byrd behind their truck, intended to kill him, or that it was their conscious objective or their desire to do so. Without such testimony, Brewer and his codefendants were guilty of murder, not capital murder. “As a ‘result of conduct’ crime, murder while committing [kidnapping] must be with the specific intent to cause the death to qualify as a capital murder under section 19.03(a)(2), with the culpable mental state necessary to satisfy the ‘conduct elements’ of the underlying offense.”

As a party to the murder, if Brewer, under Texas Penal Code section 7.02(b), agreed with his codefendant’s to commit the initial kidnapping, and while committing that felony his fellow conspirator commits murder, and if Brewer should have anticipated a murder would occur, then Brewer could have been held responsible and prosecuted for capital murder. Ironically, only Brewer’s claim that his codefendant, Shawn Berry, slit Byrd’s throat prior to the dragging gives any credence to a charge of murder during the course of a kidnapping. Billy Rowles, the sheriff that investigated the murder said, “There was absolutely no throat cut[.]” Wasn’t even scratches on the throat where a

there was no showing of intent to cause the death of the victim where the defendant, while committing a robbery, fired a warning shot that ricocheted into the victim), overruled on other grounds by Cook, 884 S.W.2d at 488–91, as recognized in Roberts v. State, 273 S.W.3d 322, 329 (Tex. Crim. App. 2008).

68. Metze, supra note 7, at 250.

69. As defined in any of the nine ways set out in section 19.03, or if the person should have anticipated a capital crime would be committed as set out in section 22.021. This is assuming *Kennedy v. Louisiana*, 554 U.S. 407 (2008), has not rendered this statute ineffectual and unconstitutional.


knife had done it."\footnote{72}{Id.}

Also, there is the question of whether Byrd was kidnapped in the first place. The testimony was that Byrd was seen walking down a road that night and later was seen riding alone in the bed of a pickup truck with three people riding in the cab.\footnote{73}{King v. State, 29 S.W.3d 556, 558 (Tex. Crim. App. 2000) (en banc).} This would indicate that Byrd was a willing companion. No one saw someone sitting in the back of the truck with Byrd ostensibly denying Byrd his freedom by acts that would qualify as restraint with intent to prevent Byrd’s liberation by secreting or holding him in a place where he is not likely to be found or by using or threatening to use deadly force.\footnote{74}{See generally TEX. PENAL CODE ANN. § 20.01(2) (West 2011) (defining “abduct”).} However, the Court of Criminal Appeals, in John William King’s appeal, rejected the argument that no kidnapping occurred finding “the act of chaining Byrd to the truck and dragging him for a mile and a half was, by itself, a kidnapping under the law.”\footnote{75}{King, 29 S.W.3d at 563 (footnote omitted).} But it is not the existence or timing of a kidnapping that creates the concern over Brewer’s conviction. The intent to murder Byrd in the commission of the kidnapping is the problem.

Brewer’s exact involvement, as a party or as a primary actor, in the kidnapping that led to Byrd’s death creates no problem. Under section 7.02(a)(2) of the Texas Penal Code, Brewer is criminally responsible for the acts of his codefendants, upon a showing that he “solicit[ed], encourage[d], direct[ed], aid[ed], or attempt[ed] to aid” in the kidnapping of Byrd.\footnote{76}{Tucker v. State, 771 S.W.2d 523, 529 n.2 (Tex. Crim. App. 1988) (citing TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2011)).} There is little doubt of Brewer’s involvement in a kidnapping and his
culpability in such an act. But despite whether Brewer acted as a party or as a primary actor in a kidnapping, there is no evidence that in chaining Byrd to the pickup truck—regardless of who actually did the chaining—that the intent of that act was to cause Byrd’s murder while acting with intent to promote or assist in the commission of the kidnapping.77 Without the proper mens rea, Brewer is not guilty of capital murder.

Brewer, as an accomplice (party) to such a knowing murder of Byrd, could have been convicted of the lesser included offense of murder only if it could have been shown that his intent was to promote or assist in the commission of the kidnapping—not the more serious offense of capital murder.78 If it was shown that Brewer should have been aware (knowing mens rea) that the act of dragging Byrd behind the truck would result in Byrd’s death, but the death was not intended, then Brewer would be guilty only of murder, not capital murder. It is the criminal mens rea of Brewer that matters as he should have been convicted of only those crimes for which he had the requisite mental state.79

As an aside, there are those that believe using kidnapping as the underlying crime as an aggravating circumstance to increase a murder to a capital felony may be over-broad in violation of the Eighth Amendment.80 As restraint can be shown with the slightest of movement or temporary confinement,81 virtually every murder involves some restraint of the victim’s movements. An argument can be made that using kidnapping as an

77. Id. (explaining the legal standard in Texas for criminal liability stemming from acts of another).
78. See Vanderbilt v. Collins, 994 F.2d 189, 195 (5th Cir. 1993); see also Beck v. Alabama, 447 U.S. 625, 637 (1980); cf. Cordova v. Lynaugh, 838 F.2d 764, 767 (5th Cir. 1988) (“Beck stands for the proposition that ‘the jury [in a capital case] must be permitted to consider a verdict of guilt of a noncapital offense in every case in which the evidence would have supported such a verdict.’” (alteration in original) (citation omitted) (internal quotation marks omitted)).
79. See Ex parte Thompson, 179 S.W.3d 549, 554 (Tex. Crim. App. 2005) (“What matters under Section 7.02(a) is the criminal mens rea of each accomplice; each may be convicted only of those crimes for which he had the requisite mental state.”).
aggravating circumstance hardly narrows the class of murderers who are eligible for capital punishment as contemplated by Jurek v. Texas.\textsuperscript{82}

Legal arguments can be made for why Troy Davis and Lawrence Brewer should not have been executed. With the complicated nature of capital murder in most jurisdictions, especially in Texas, seldom is such an argument unavailable.\textsuperscript{83} But the ease by which these and other legal arguments were passed over by the courts makes one wonder to what extent other considerations factored into the decisions to allow the execution of these two men. The uncertainty of Troy Davis’s guilt played heavily in the outcry preceding his execution, but ultimately failed to secure a punishment less than death. The certainty of Lawrence Brewer’s guilt was of little concern except to Brewer. Few thought Brewer or Davis were actually innocent of wrongdoing. There are other arguments that can be made to address the many dynamics at play. Our society cannot ignore the innocent, the financial cost, or the immorality of the death penalty any longer. It is within these three foci that an argument can be made to abolish the death penalty, even when guilt and culpability is certain and at its most evil.

IV. THE INNOCENT

Despite the protests of some,\textsuperscript{84} there is little doubt that we have executed innocent people. If not Troy Davis, “[g]iven the number of exonerations in recent years, including many off death

\textsuperscript{82} Cf. 428 U.S. 262, 268, 270 (1976) (discussing the Texas legislature narrowing the scope of its laws relating to capital punishment); see, e.g., Brimage, 918 S.W.2d at 490 (Miller, J., concurring in part and dissenting in part); cf. Jurek v. Texas, 428 U.S. 262, 268, 270 (1976) (discussing the Texas legislature narrowing the scope of its laws relating to capital punishment).

\textsuperscript{83} Metze, supra note 7, at 310, 313. In my article I argue Texas’s statutes—which now include 146 ways to commit a capital felony—fail to provide an effective mechanism for narrowing those who are death-eligible as required by Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

\textsuperscript{84} See Kansas v. Marsh, 548 U.S. 163, 188 (2006) (Scalia, J., concurring) (making the now infamous remark that if just one case of executing an innocent person had occurred, “the innocent’s name would be shouted from the rooftops by the abolition lobby”).
row, it seems highly improbable that there has not been at least one innocent person executed . . . .”

Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, yet the finality of death precludes relief. An executed person has indeed “lost the right to have rights.” As one 19th century proponent of punishing criminals by death declared, “When a man is hung, there is an end of our relations with him. His execution is a way of saying, ‘You are not fit for this world, take your chance elsewhere.’”

Despite the protestations of some, courts have made it clear that the execution of the innocent goes afool of our Constitution. The Supreme Court has stated that a “truly persuasive demonstration of ‘actual innocence’ [in a capital case] . . . would render the execution of a defendant unconstitutional . . . .” Further, in transferring the writ of habeas corpus of Troy Davis to the district court for hearing and determination, Justice Stevens said, it “would be an atrocious violation of our Constitution and the principles upon which it is based’ to execute

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85. Metze, supra note 7, at 326; see also id. at 326 n.518 (citing Daniel B. Wood, Ronnie Lee Gardner: Is Utah Firing Squad a More Humane Execution?, THE CHRISTIAN SCI. MONITOR (June 17, 2010), http://www.csmonitor.com/USA/Justice/2010/0617/Ronnie-Lee-Gardner-Is-Utah-firing-squad-a-more-humane-execution (placing the number of death row inmates exonerated in recent years at 250)).

86. Furman, 408 U.S. at 290 (Brennan, J., concurring) (citations omitted)

87. Justice Scalia, joined by Justice Thomas, dissenting from the Court transferring Troy Davis’s habeas application to the district court, famously said,

This Court has never held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged ‘actual innocence’ is constitutionally cognizable.


an innocent person.”

Justice Stevens continues, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) “is arguably unconstitutional to the extent it bars relief for a death row inmate who has established his innocence.”

“Nothing could be . . . more shocking to the conscience than to execute a person who is actually innocent.”

The adjective “actual” in relation to the word “innocent” first appears in the twentieth century in Supreme Court jurisprudence in 1969, in Kaufman v. United States. It is almost a decade later, in Lakeside v. Oregon before the next reference to this odd pairing of words. Both of these cases were appeals of criminal convictions—the first for armed robbery and the other for escape. It is no coincidence that from 1986 to the present, all but four of the thirty-nine cases that use the word pairing “actual” and “innocent,” in whatever form, do it in relation to either a habeas corpus or death penalty issue.

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89. In re Davis, 557 U.S at ___, 130 S. Ct. at 2 (Stevens, J., concurring) (quoting In re Davis, 565 F.3d 810, 830 (11th Cir. 2009) (Barkett, J., dissenting)).


91. In re Davis, 557 U.S. at ___, 130 S. Ct. at 2 (Stevens, J., concurring).

92. Herrera, 506 U.S. at 430 (Blackmun, J., dissenting) (citing Rochin v. California, 342 U.S. 165, 172 (1952)).


94. 435 U.S. 333, 342–43 (1978) (Stevens, J., dissenting). Oddly it is Justice Stevens in this dissent who first uses the “actual innocence” moniker in modern case law. He says,

> [t]he presumption of innocence and the protections afforded by the Due Process Clause impose a significant cost on the prosecutor who must prove the defendant’s guilt beyond a reasonable doubt without the aid of his testimony. That cost is justified by the paramount importance of protecting a small minority of accused persons—those who are actually innocent—from wrongful conviction.

*Id.*


Supreme Court created the status of actual innocence as a method of limiting access to the appellate courts of the convicted while supporting unconstitutional overreaching by Congress.

Courts have obviously created their own definition of innocence: a modern higher form of neo-innocence. It is curious that one can be actually innocent—like being actually pregnant or actually dead. Often, the accused can be barely innocent or somewhat innocent, overwhelmingly innocent or mostly innocent too. What an intellectual embarrassment that we qualify innocence, the first state of humankind. We should never put procedure before liberty. Higher authority than our Constitution forbids the state from executing the innocent. But to some, more than an appeal to the wrongfulness of executing the innocent is the sheer financial burden this process costs. Those who support the death penalty in its current form traditionally oppose wasteful governmental spending and would favor a more pragmatic, economically sound—yes conservative—form of justice.

V. THE FINANCIAL COST

Twenty years ago it cost three times as much money to house an inmate in a single cell at the highest security level for forty years as it did to prosecute a trial and appeal a capital case. With the emphasis in recent years on the growing unavailability of public funds for all purposes, the financial cost of this continued experiment is finally recognized as a problem. It is well-recognized that the cost of maintaining a death row is a financial drain upon society and public opinion is turning against it. News reports predict that California alone would save $1 billion over the next five years by eliminating its death penalty. Each execution in California cost the taxpayers of that state $250 million—in Florida, $24 million per execution. According to one study, North Carolina would save $11 million a year on criminal justice costs if they had no death penalty. Other states such as Maryland, Colorado, Kansas, Nebraska, New Hampshire, Montana, and New Mexico in recent years all discussed the abolition of the death penalty as a realistic alternative to the high costs of such prosecutions. Justice John Paul Stevens, in reviewing Professor David Garland’s book *Peculiar Institution: America’s Death Penalty in an Age of Abolition*, discusses the classes of people affected by capital crimes—victims, survivors, judicial participants, the general public, and the condemned. Justice Stevens labels the costs on

97. Metze, supra note 7, at 327 n.523.
99. Id.
the judicial system “monumental,” quoting Professor Garland that the financial cost of capital cases is double the cost of noncapital murder cases. Justice Stevens quoted Justice White saying, “the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.’” Such social and public purposes are reflected in our public policy which is the outward expression of the morality of our society.

VI. IMMORALITY

Whether it is the reference to morality in the statutes or in the case law, the morality of the death penalty and the role of morality in Constitutional interpretations has always been a prime consideration. For example, “the Due Process Clause embodies a system of rights based on moral principles so deeply

AN AGE OF ABOLITION (2010)).
104. Id.
105. Id.
106. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2006) (defining the second special issue in punishment using the defendant’s personal moral culpability as one of the guide posts for the jury to consider in evaluating whether to give life rather than death). That article states, to wit:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Id. § 2(e)(1) (emphasis added). See also id. § (f)(4) (“The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury . . . (4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant’s moral blameworthiness.”) (emphasis added).

embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history.” Justice Brennan felt it was “doubtful” that the death penalty “strengthen[s] the community’s moral code” and if it has any effect at all, “it more likely tends to lower our respect for life and brutalize our values.” During the modern era of death penalty jurisprudence, the courts looked at the “moral consensus” on the death penalty in the determination of its constitutionality, and mitigating circumstances could be “considered as extenuating or reducing the degree of moral culpability or punishment.” To be constitutional, the application of the death penalty had to be “tailored to [the defendant’s] personal responsibility and moral guilt.”

Early in his career, Justice John Paul Stevens recognized that the death penalty was “qualitatively and morally different from any other penalty . . .” For others on the Supreme Court, the concept lost its viability much earlier in their career. Justice Thurgood Marshall, speaking from a particularly poignant viewpoint, called the death penalty “morally unacceptable.” Justice Blackmun, over a decade later said, “I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.” Others on the Court used morality as an adjective to characterize others’ opposition to their position. Justice O’Connor labeled the majority’s rationalization in Roper v. Simmons for a prohibition on the

109. Furman, 408 U.S. at 296 (Brennan, J., concurring) (emphasis added).
110. Id. at 303 (emphasis added).
execution of those who commit a capital murder prior to age eighteen as a “moral proportionality argument.”\textsuperscript{117} And in dissenting from the prohibition on the execution of the intellectually disabled, Justice Scalia said the majority’s opinion was a “moral consensus that all mental retardation renders the death penalty inappropriate for all crimes . . .”\textsuperscript{118} Morality has played an important, ever present role in defining, limiting, and characterizing views on the constitutionality and applicability of the death penalty.

Morality is deeply rooted in the religious history of a people and interwoven in its social organizations.\textsuperscript{119} Ironically, in a country that boasts the removal of religious considerations from public policy and political action, morality seems to be a reoccurring theme in death penalty jurisprudence. The role of religion in this debate—by defining what is moral—sets the compass that guides our way.

Professor Thomas C. Berg argues that the religious, conservative proponents of the death penalty in this country will not be swayed from their support of capital punishment with an appeal to the immorality of the death penalty alone.\textsuperscript{120} He believes they will be more influenced by the execution of innocent people, the failings of ineffective assistance of capital defense lawyers, and arbitrary or racial disparities.\textsuperscript{121} But most important to this segment of our population is the theological theme of redemption through divine mercy and grace.\textsuperscript{122} Prematurely ending a convicted person’s life through execution shortens the opportunity for remorse and rehabilitation.\textsuperscript{123} As this group measures morality by a strict interpretation of Biblical

\textsuperscript{120} Thomas C. Berg, Religious Conservatives and the Death Penalty, 9 WM. & MARY BILL RTS. J. 31, 56 (2000).
\textsuperscript{121} Id. at 51.
\textsuperscript{122} Id. at 52–53.
\textsuperscript{123} Id. at 53.
verse, perhaps evangelical Bible references are not the best way to explain the immorality of capital punishment as out-of-context Bible verses often are interpreted many different ways. But conservative Americans have a strong common sense when confronted with right and wrong. The unfairness of executing an innocent person, the arbitrary way in which some are singled out for prosecution, or the monumental financial burden upon society created by the death penalty all play strongly within the conservative religious right. These people believe in the basic goodness of the human spirit and the opportunity for one that has transgressed to return from a life misspent. I disagree with Professor Berg only to the extent that I believe their morality and basic beliefs of right and wrong will eventually move them to understand.\footnote{124}

The Catholic Church, historically a proponent of capital punishment to enforce morality and dogma,\footnote{125} has recognized during this century “the value and inviolability of human life,”\footnote{126} including the lives of “criminals and unjust aggressors.”\footnote{127} “When the Church declares that unconditional respect for the right to life of every innocent person—from conception to natural


\footnote{125}{See Berg, \textit{supra} note 120, at 40.}

\footnote{126}{Id. at 41–42.}

\footnote{127}{The present Encyclical, the fruit of the cooperation of the Episcopate of every country of the world, is therefore meant to be a \textit{precise and vigorous reaffirmation of the value of human life and its inviolability}, and at the same time a pressing appeal addressed to each and every person, in the name of God: \textit{respect, protect, love and serve life, every human life!}


\footnote{127}{\textit{POPE JOHN PAUL II, \textit{supra} note 126, para. 57.}}}
death—is one of the pillars on which every civil society stands, she ‘wants simply to promote a human State.’” 128 The teachings of the Catholic Church are to “respect, protect, love and serve life, every human life!” 129

The sacredness of life gives rise to its inviolability, written from the beginning in man’s heart, in his conscience. The question: “What have you done?” (Gen 4:10), which God addresses to Cain after he has killed his brother Abel, interprets the experience of every person: in the depths of his conscience, man is always reminded of the inviolability of life—his own life and that of others—as something which does not belong to him, because it is the property and gift of God the Creator and Father.

The commandment regarding the inviolability of human life reverberates at the heart of the “ten words” in the covenant of Sinai (cf. Ex 34:28). In the first place that commandment prohibits murder: “You shall not kill” (Ex 20:13); “do not slay the innocent and righteous” (Ex 23:7). But, as is brought out in Israel’s later legislation, it also prohibits all personal injury inflicted on another (cf. Ex 21:12-27). Of course we must recognize that in the Old Testament this sense of the value of life, though already quite marked, does not yet reach the refinement found in the Sermon on the Mount. This is apparent in some aspects of the current penal legislation, which provided for severe forms of corporal punishment and even the death penalty. But the overall message, which the New Testament will bring to perfection, is a forceful appeal for respect for the inviolability of physical life and the integrity of the person. It culminates in the positive commandment which obliges us to be responsible for our neighbour as for ourselves: “You shall love your neighbour as yourself” (Lev 19:18). 130

In effect, the absolute inviolability of innocent human life is a moral truth clearly taught by Sacred Scripture, constantly upheld in the Church’s Tradition and consistently proposed by her Magisterium. This consistent teaching is the evident result

128. Id. at para. 101.
129. Id. at para. 5.
130. Id. at para. 40.
of that “supernatural sense of the faith” which, inspired and sustained by the Holy Spirit, safeguards the People of God from error when “it shows universal agreement in matters of faith and morals”.

If those of the Catholic faith would understand their power in this debate, the death penalty would find a quick end. Catholics comprise twenty-one percent of the population of the United States—four times larger than the Southern Baptists, the largest Protestant group—thus two of every ten persons on a capital venire panel are Catholic. Whereas those who favor the death penalty treat the jury selection process as an audition—saying the most incredible things to secure a place on the jury—Catholics almost always profess their faith and the doctrine of that faith leading to their quick exit. Proponents of the death penalty find it quite easy to misrepresent their true beliefs to secure a seat on a capital jury. Should those of the Catholic faith, develop the ability to also misrepresent their beliefs for the same purpose, there would never be another death sentence given by a unanimous jury.

131. Id. at para. 57 (emphasis added).


133. By what authority would I dare imply that those of the Catholic faith can misrepresent their beliefs to secure a place on a capital jury? Certainly it would be unethical for me to do so as their lawyer. See TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 3.03, available at http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96. But it is not unethical for me to remind those of the Catholic faith of their duty to defend human life.

Catholics believe one can never change the “nature of a lie rendering it a good action.” Doug McManaman, The Virtue of Justice, CATH. EDUC. RES. CTR., http://www.catholiceducation.org/articles/education/ed0285.html (last visited Dec. 22, 2011). There is a “moral debt” to truthfulness. Id. However, there are circumstances where one has a duty to withhold information from another. This doctrine is called “mental reservation.” Id.

In an article on lying and whether a Catholic should equivocate in telling the truth, the author quotes Note G of Blessed John Henry Cardinal Newman’s Apologia Pro Vita Sua. Cardinal Newman speaks to mental reservation:
“If a man has used a reservation (restrictione non purè mentali) without a grave cause, he has sinned gravely . . . . Under the name of mental reservation theologians authorize many lies, when there is for them a grave reason and proportionate . . . .” St. Alfonso, in another Treatise, quotes St. Thomas to the effect, that if from one cause two immediate effects follow, and, if the good effect of that cause is equal in value to the bad effect (bonus equivalet malo), then nothing hinders the speaker’s intending the good and only permitting the evil. From which it will follow that, since the evil to society from lying is very great, the just cause which is to make it allowable, must be very great also.


In the Catechism of the Catholic Church the Fifth Commandment “You shall not kill,” is the following:

Assuming that the guilty party’s identity and responsibility have been fully determined, the traditional teaching of the Church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor.

If, however, non-lethal means are sufficient to defend and protect people’s safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity to the dignity of the human person.

Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm—without definitely taking away from him the possibility of redeeming himself—the cases in which the execution of the offender is an absolute necessity “are very rare, if not practically nonexistent.”

. . . .

Those who renounce violence and bloodshed and, in order to safeguard human rights, make use of those means of defense available to the weakest, bear witness to evangelical charity, provided they do so without harming the rights and obligations of other men and societies. They bear legitimate witness to the gravity of the physical and moral risks of recourse to violence, with all its destruction and death.


So it is the Catholic teaching that gives the “grave cause” by which mental reservations may be used when one is confronted with their opinions on
the death penalty. As the requirements of the Catholic faith and our law dictate, it is the State’s duty in a capital trial to show that only lethal means are available to protect people’s safety before a Catholic can consider acquiescence to the death penalty.

Without themselves harming “men or society,” Catholics must use available means to defend the weak, promote charity, and renounce violence and bloodshed, being always mindful of the “moral risks” of violence, and its “destruction and death.” By the use of mental reservation, the Catholic has a duty to withhold information during the jury selection process in a capital trial but only upon a grave cause—that grave cause being the exercise of the death penalty when other means of protecting society are available (i.e. incarceration).

By unnecessarily excluding themselves from the jury selection process those of the Catholic faith permit a jury to exercise the ultimate punishment upon one found guilty of a capital crime without proof of the necessary safeguard of their faith—that no other means of protecting society are available. The doctrine of mental reservation permits a Catholic to withhold a full explanation of Catholic doctrine and their beliefs to better ensure the participation of the faith in the ultimate decision of life or death.

For a Catholic, there could be no greater cause than to prevent the wrongful killing of a human being whose opportunity for redemption would be artificially, prematurely terminated through that death. Only when the death penalty is the “only possible way” of defending human lives would its use be defendable in Catholic teaching and it is clear Catholics may withhold this information to serve the greater good. In the interest of maintaining human dignity and in keeping the common good, the use of “non-lethal” means must always be used. By the use of incarceration and modern correction techniques, the state can always render the guilty party incapable of rendering further harm without taking away the possibility of that person redeeming himself; life in prison without the possibility of parole would almost always ensure a natural death. It is the state’s duty to show its inability to prevent further harm before the “very rare” possibility of an execution can be justified under Catholic teaching. It is the Catholic’s duty to be present on a jury that makes this decision to insure the death penalty is a “very rare” occurrence and to insure its use is in conformity with the teachings of their faith.

Consistency in the abhorrence of violence is the hallmark of the Church’s teaching on the death penalty. In the Culture of Life and the Death Penalty the U.S. Bishops also point to the fact that state-sanctioned killing diminishes us all, the application of capital punishment is flawed and inconsistent, and that the state has other ways of punishing criminals. They especially call for compassion and care for the victims and families of the terrible crimes and evil that leads society to use the death penalty.

“In Catholic teaching the state has the recourse to impose the death penalty upon criminals convicted of heinous crimes if this ultimate sanction is the only available means to protect society from a grave threat to human life,” say the Bishops. “However, this right should not be exercised when other ways are available to punish
The worst terrorist bombing in U.S. history occurred when the Alfred P. Murrah Federal Building in Oklahoma City was bombed on April 19, 1995, killing 168 people.\textsuperscript{134} As a result, 683 people injured.\textsuperscript{135} The most heinous example of one accused of a capital crime in the United States, where the certainty of his guilt was not an issue, must be in the trial of Timothy McVeigh for this crime.\textsuperscript{136} Although it took McVeigh’s jury four days to deliberate his guilt, few who remember this trial harbor any reasonable doubt as to McVeigh’s participation in the Oklahoma City bombing.\textsuperscript{137}

Just as in the case of Lawrence Brewer, morality had to drive any objection to the capital punishment sentence of McVeigh. Although I have made a legal argument above for the inappropriateness of Brewer’s execution, this was done to remove his unsympathetic nature from the argument. When one considers the nature of Brewer’s character, only an appeal to the fundamental foundations of a society could possibly support an argument for a life punishment. On the other hand, as his motivation to commit his most heinous crime, McVeigh operated from a love of country—albeit misguided by most standards.\textsuperscript{138}

Pope John Paul II said that while the death penalty can be justified (and is, therefore, not an intrinsic evil), such cases in the modern world are rare, “if not, practically non-existent.”


\textsuperscript{135} \textit{Shariat et al., supra} note 134.

\textsuperscript{136} \textit{See McVeigh}, 153 F.3d 1166.

\textsuperscript{137} \textit{Id.} at 1179.

\textsuperscript{138} Stephen Jones & Jennifer Gideon, United States v. McVeigh: \textit{Defending The “Most Hated Man in America,”} 51 OKLA. L. REV. 617, 645 (1998) (“McVeigh’s political views, while in many cases extreme, were no different than
However, despite their crimes, Brewer and McVeigh should still receive the most vigorous and thoughtful defense. In the evolution of our mature society, an argument for a life can be made for the lives of Brewer and McVeigh.

After all, it is the outcast nature of McVeigh and Brewer that provides the reason for mercy. It is cruel and unusual for a society with our history of civil liberties and freedom to apply any penalty “selectively to [those] whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer . . . .”139 Our history of retributive punishment lends itself perfectly to overreaction toward the unsympathetic accused. Justice Douglas warns that our tendency to justify the suffering of the outcast runs afoul of our prohibition against unconstitutional punishments and smacks of vengeance as our courts do not see vengeance as justifiable in our retributive system.140 Vengeance panders to the fears of the public and, in particular, to the pain of surviving family members of the victims of capital murder. Vengeance eliminates the opportunity to restore the damage done to the all those who are affected by such crime—the surviving family and friends and the community as a whole.

The repair of relationships through “reconciliation and reassurance,” affording “all stakeholders affected by a breach of the law . . . an opportunity to participate in deciding what to do about it,” is the foundation of restorative justice which “requires accountability for the crime committed and the resulting harm.”141 Restorative justice “respects the victim and the offender and eventually repairs the damage suffered by the

perhaps the average Pat Buchanan supporter, and his views towards some aspects of federal law enforcement are probably shared by several million people; judging from the reaction of some to the incidents at Ruby Ridge and Waco.

140. Id. at 255.
All those with a stake in an offense should be involved in identifying and addressing the harm done by the wrongdoer, the needs of those affected, and the obligation of the offender to facilitate healing and to “put things as right as possible.” From the traditions of indigenous cultures, our society has learned that an emphasis on respectful dialogue between the affected parties reduces and resolves conflict. The idea of peacemaking, linked to the indigenous people of North America, yields a process for making things right again after such a crime as committed by Brewer and McVeigh. Less legalistic arguments expressing the categorical objection to the death penalty must be made—arguments that appeal to our great traditions.

What would a jury think of a young man who loved his country by voluntarily putting his life on the line in the Army; who was an intelligent, positive thinker, a hard worker who took on the hardest tasks; who was a dependable, honest, helpful, compassionate, and understanding friend? Who took care of those who needed help; who was funny, cheerful and happy; who was “deeply devoted to the ideals upon which this country was founded . . . believed deeply in the inalienable right to bear arms, to defend against governmental tyranny?”

142. Id. at 328.
146. Closing Argument, supra note 138, at 13134.
147. Id. at 13134–35.
148. Id. at 13135.
149. Id.
150. Id. at 13136.
type of rugged individual of which this country has always been proud;\textsuperscript{151} who was willing to lay down his life for his country;\textsuperscript{152} who was a “good young man, deeply devoted to his country,” with “a sense of fear, a sensitivity to impending persecution, a sensitivity to government intrusion in the lives of ordinary citizens?”\textsuperscript{153} Who believed the government was responsible for the loss of innocent lives at Ruby Ridge, Idaho, and Mt. Carmel near Waco, Texas;\textsuperscript{154} who was a good man except for the commission of one unthinkable act; who was “impassioned and passionate” in his “beliefs about his government, about a government that he believed was acting like England in the 18th century?” Who “had turned upon its own people;”\textsuperscript{155} who felt in his unthinkable acts he was “defending the underdog;”\textsuperscript{156} and who believed that governmental tyranny had to be resisted?\textsuperscript{157} In other times, this may be the portrait of a hero and patriot. These are characteristics of a life well lived in devotion to a cause, to friends and family. These are things said about Timothy McVeigh in Attorney Richard Burr’s closing argument in the punishment phase of McVeigh’s trial.\textsuperscript{158} This argument fell on deaf ears.

Also in Mr. Burr’s final argument was the story of Susan Urbach:

“Any scar tells a story, and the story it tells is—it tells a story of a wounding and a healing that goes along with that wounding. And the more deeply you’re wounded, the more healing that must come your way. You must experience for that wound to close up and for you to get your scar. I mean, you don’t get your scar unless you’ve been wounded and you have been healed, and I’ve got my scar, and I’m proud of it . . . .” But whatever healing may happen, it will come from within. It will not be hastened or indeed aided by the decision you [the jury]

\begin{itemize}
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Id.
  \item \textsuperscript{153} Id. at 13136–37.
  \item \textsuperscript{154} Id. at 13137.
  \item \textsuperscript{155} Id. at 13138–39.
  \item \textsuperscript{156} Id. at 13139.
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Id. at 13136–39.
\end{itemize}
make about sentence. That is another separate reality . . .

How do we teach love and compassion when what we are confronted with is hate? . . . When hate leads to killing, do we abandon our commitment to love and compassion by killing the killer?

If in that process we decide that there is nothing in the life of the killer or in the reasons for the killing that touches our conscience and that we can rest easy with our conscience, if we put the killer to death, we have acted with love and compassion under the law, even though we ourselves have taken a life . . .

Tim McVeigh’s crime was not the product of evil motive. Deluded though you may think it was, his motive was based on qualities that in other contexts we applaud: Resistance to tyranny, sacrificing life in an attempt to accomplish a greater good, laying one’s own life on the line to resist the encroachment of the nation’s enemy. But even more important than that, aren’t we all in some way implicated in his crime?

Mr. McVeigh’s beliefs about Waco and Ruby Ridge and the threat presented by militarization of federal law enforcement did not arise in a vacuum, did not arise out of thin air. They are not the delusional fantasies of a madman. Somehow, somewhere, in the midst of Mr. McVeigh’s misplaced, mistakenly acted upon, horrifyingly out-of-proportion beliefs, there is a reason for all of us to have concern. That we have not expressed that concern before this tragedy means that we all bear some responsibility for Oklahoma City. We should not feel a clear conscience if we kill Timothy McVeigh.

Davis and Brewer’s convictions can be addressed by what Professor Finkelstein calls the contingent opposition to the death penalty. As I believe the implementation of the death penalty has once again assumed its arbitrary and capricious pre-Furman character, and as the appellate process leads attorneys to attack the procedures and circumstances of capital punishment—as opposed to the morality—those that categorically oppose the

159. Id. at 13140–42 (quoting Oklahoma City bombing victim Susan Urbach).
death penalty find themselves on the periphery of the argument throwing stones into the mix that usually miss the intended targets and fall, without effect, at the feet of justice. In a country that places such stock in morality and ethics, it seems incredulous that the Constitution must be addressed only in compartmental objections: cruel and unusual punishment, due process, equal protection, manifest injustice, actual innocence, or the burdensome cost to reach a judicial solution.

But such compartmental objections are not non-moral issues. With our country’s history, we cannot treat those accused of crimes—both in substance and procedure, definition and punishment—in ways that ignore what has distinguished this society in its brief history. In our society, it is a moral issue when any institution disparately impacts someone on the basis of their minority status. Those moral issues create categorical objections to that institution’s continuation. The death penalty, as applied in the United States, is just such an institution. No one can legitimately craft an argument for the continuance of a system that “enables the [death] penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.”

Near the end of his career on the Court, Justice Stevens quoted Justice White and said,

I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents “the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”

Even when applied to those as despised as Troy Davis, Lawrence Brewer, and yes, Timothy McVeigh, what with (1) the

possibility of executing an innocent person—or one wrongly charged, (2) the high costs of capital prosecution, and (3) the immorality of killing other human beings—especially when done in a manner which is discriminatory to minority segments of the population—whether certain or uncertain of guilt, the abolition of the death penalty “mak[es] us a civilized society. It shows we actually do mean business when we say we have reverence for life.”

163. I intentionally saved until the end of this Article the issue of race in death penalty jurisprudence. I never discussed or alluded to the race of the executed or the murdered in the cases discussed herein. So it is clear, Troy Davis, an African-American man, was executed for killing a white police officer. Lawrence Brewer, a white supremacist, was executed for killing an African-American man. What has gone without saying in this Article until now is that Lawrence Brewer’s execution was the first time in Texas a white person has been executed where the victim or victims did not include another white person. Not since Reconstruction in Texas had a white person who killed a black person only been executed as a result of the murder. See Metze, supra note 7, at 330 n.531. Much was made of the race of Troy Davis and Lawrence Brewer and the race of their victims. In fact, some argued Brewer died with less time on death row because he was white. See James Fulford, Troy Davis, Lawrence Brewer, Wyatt Matthews and the Disparate Death Penalty, FULFORD FILE (Sept. 24, 2011), http://www.vdare.com/articles/the-fulford-file-by-james-fulford-troy-dav is-lawrence-brewer-wyatt-matthews-and-the-dispara. But others said, “In any just society, the race of the perpetrator—or victim—should have no bearing on the treatment of a killer.” Michael Medved, Contrasting Executions, TOWNHALL.COM (Oct. 6, 2011, 3:32 PM), http://townhall.com/tipsheet/michael medved/2011/10/06/contrasting_executions. As I made a plea for the abolition of the death penalty based upon the disparate treatment of minorities in my previous article above-referenced, I thought it best in this Article to leave race at the doorstep of reason until now.

A ROBUST INDIVIDUAL RIGHT TO BEAR ARMS VERSUS THE PUBLIC’S HEALTH: THE COURT’S RELIANCE ON FIREARM RESTRICTIONS ON THE MENTALLY ILL

Katherine L. Record*
Lawrence O. Gostin**

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I. INTRODUCTION

“None of us can know with any certainty what might have stopped these shots from being fired or what thoughts lurked in the inner recesses of a violent man’s mind,” said President Barack Obama while trying to console the nation in the wake of the January 2011 attempted assassination of Representative Gabrielle Giffords in Tucson, Arizona.1 The shooting at a civic

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** J.D., LL.D. (Hon.); Linda D. & Timothy J. O’Neil Professor of Global Health Law and Faculty Director of the O’Neill Institute for National and Global Health Law, Georgetown University Law Center; Director, World Health Organization Collaborating Center on Public Health Law & Human Rights; Professor, Johns Hopkins Bloomberg School of Public Health; Visiting Professor, Faculties of Law and Medical Sciences, University of Oxford.

gathering left six bystanders dead, renewing the politically divisive debate about the appropriate response to violence: ban dangerous weapons or prohibit dangerous individuals from possessing firearms?

The public overwhelmingly supports limiting access to firearms for children, violent criminals, and persons with mental illness, which is consistent with the National Rifle Association’s insistence that “guns don’t kill people, people kill people.”

Children lack the competency and maturity to use firearms wisely, whereas most convicted felons have a history of violence. Singling out persons with mental illness, however, is far more complex because they represent a broad spectrum of individuals, some of whom already have been subjected to social ostracism, but the majority of whom are not violent.

The Supreme Court’s recent decision that the Second Amendment confers an individual’s right to bear arms renders it increasingly difficult to enact generally applicable laws regarding firearms, but the Court explicitly supports “longstanding prohibitions on the possession of firearms” by individuals with mental illness.

In hindsight, Jared Lee Loughner—the youth accused of shooting Giffords—is easily labeled as mentally ill, but prospectively identifying such dangerous individuals is fraught with difficulties.

II. AN EXPANDED INTERPRETATION OF THE SECOND AMENDMENT

A constitutionally protected individual right to bear arms is not a foregone conclusion under U.S. law. In fact, the scope of the Second Amendment has expanded considerably over the past

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three years. In 2008, the Court held for the first time that the Second Amendment protects an individual’s right to possess a loaded handgun—striking down the District of Columbia’s ban on handguns, as well as its requirement that other arms be unloaded or protected by a safety lock. 5 Just last year, the Court went further, finding that the Second Amendment not only limits the federal regulation of firearms, but state restrictions as well, rejecting the long-held premise that the Second Amendment serves not to arm the civilian public, but to protect the states from unfettered federal power. 6

Legally speaking, the Court held that the right to bear arms was so fundamental that due process required that it constrain state as well as federal power. 7 Practically speaking, the Court held that the right to bear arms was so fundamental that all regulations would be held to the same standard—from Camden, New Jersey to Recluse, Wyoming—regardless of legislators’ interest in curbing violent crime. In other words, limitations on the right to bear arms can be placed only on certain groups (e.g., felons, the mentally ill), or in certain locations (e.g., government or school buildings). Universal bans that one might expect in a densely populated urban area—such as restrictions against concealed weapons or dangerous handguns—are prohibited. Other categorical restrictions such as limiting the number of arms an individual may possess, requiring gun owners to enroll in firearm training, or imposing licensing requirements on purchasers are all subject to litigation. In the wake of the Court’s expansive reading of the Second Amendment, the National Rifle Association challenged numerous firearm regulations, including a ban on sales to children and teens, 8 threatening fiscally constrained municipalities and states with expensive legal battles.

7. Id. at ___, 130 S. Ct. at 3050.
III. GUN CONTROL LAWS

Gun advocates applauded the Court’s recent interpretation of the Second Amendment, asserting that categorical restrictions (e.g., based on mental illness or a criminal record) are the only Constitutional limits that can be placed on the right to bear arms. Yet they fail to propose a workable solution for keeping arms out of the hands of the dangerous, demonstrating a blind reliance on a system of categorical restrictions that have failed to protect the public.\textsuperscript{9} To understand why this is, one need only review the patchwork of federal and state gun control laws; a system ubiquitous for its loopholes.

Widely publicized shootings directed at high-profile individuals (e.g., Giffords, former President Ronald Reagan, and John Lennon) or crowds of civilians (e.g., Virginia Tech, Columbine High School) fuel the public's perception that all persons with mental illness are dangerous. Legislators have responded with a patchwork of laws, excluding broad classes of individuals from purchasing firearms. However, predictions of dangerousness are highly inaccurate and categorical restrictions are rife with loopholes and inefficiencies.

The Gun Control Act of 1968\textsuperscript{10} restricts “prohibited persons” from purchasing firearms, including individuals addicted to controlled substances, those involuntarily committed to a mental institution or adjudicated as incompetent or dangerous,\textsuperscript{11} or those

\textsuperscript{9} For example, in issuing the opinion in \textit{Heller}, Justice Scalia dismissed the concern of dangerous use of firearms by assuring “[the Court's] opinion should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.” 554 U.S. at ___, 128 S. Ct. at 2816–17. In addition, subsequent to successfully challenging D.C.’s handgun ban before the Court, the advocate for Heller asserted those with mental illness should simply be “excluded from society” in order to protect the public from unsafe operation of arms. \textit{The Diane Rehm Show: Renewed Calls for Gun Control}, THE DIANE REHM SHOW (Jan. 12, 2011), available at http://thedianerehmshow.org/shows/2011-01-12/renewed-calls-gun-control/transcript.

\textsuperscript{10} 18 U.S.C. § 922(g)–(h) (2006).

\textsuperscript{11} “Adjudicated as a mental defective” includes individuals: (1) who as a result of mental illness are a danger to themselves or others; (2) who lack the mental capacity to contract or manage their own affairs; or (3) who have been found incompetent to stand trial or not guilty for reason of insanity or lack of mental responsibility. 27 C.F.R. § 478.11 (2010).
who receive a verdict of not guilty by reason of insanity. In theory, the National Instant Criminal Background Check System (NICS)\textsuperscript{12} contains the definitive list of individuals to whom licensed dealers cannot sell firearms.\textsuperscript{13} In practice, however, many prohibited persons are never entered into the NICS.

Reasoning that the NICS breaches the principles of federalism, the Supreme Court ruled in 1997 that Congress could not compel states to report prohibited persons who attempt to purchase firearms to the FBI.\textsuperscript{14} Consequently, reporting is inaccurate and incomplete; some states overreport (including patients who voluntarily seek outpatient treatment) and others underreport (including only those individuals who are involuntarily committed for ninety or more days or only those who are committed to public hospitals). Moreover, as of 2007, twenty-eight states did not report inpatients with mental illness at all.\textsuperscript{15} The Government Accountability Office estimates that the NICS mental illness data fall short by more than 2 million individuals.\textsuperscript{16}

Even if listed in the NICS, prohibited persons can successfully avoid background checks. Unlicensed (second-hand) dealers (like the individual who sold guns to the Columbine

\begin{itemize}

\item 13. The Gun Control Act requires anyone “engage[d] in the business” of selling firearms to be federally licensed, except for those making secondary sales. §§ 921(a)(21), 922(a)(1)(A). The Brady Bill requires federally licensed firearms dealers to conduct background checks before making a handgun sale, and to adhere to a five-day waiting period before finalizing the transaction. Id. § 922(s)(1), (t)(1).

\item 14. Printz v. United States, 521 U.S. 898, 935 (1997) (holding that requiring reporting into NICS is equivalent to requiring states to enforce a federal regulatory program).


\end{itemize}
shooters) are excluded from conducting background checks and can sell at gun shows—a notorious loophole. Additionally, states can issue Brady permits that allow licensed sellers to waive background checks; nineteen states offer these permits, seven of which do not exclude persons with mental illness from purchasing firearms.

The Gun Control Act incentivizes states to further regulate by making it a federal offense to sell firearms to individuals whose possession would violate state law. Yet not all states impose regulations based on mental illness, and those that do have variable laws; some states restrict only access to concealed weapons or rely, in part, on buyer self-identification as having a mental illness. Thus, even where state law supplements federal regulations, determined purchasers often access firearms.

Categorically restricting access to firearms for persons with mental illness has proved difficult and ineffectual, reducing neither suicide rates nor homicide rates. Universally applicable restrictions appear more effective; states with the most stringent firearms laws have the lowest per capita homicide rates. Yet, the Supreme Court’s rulings push states to regulate dangerous persons rather than dangerous firearms. Thus, policy makers

17. In fact, Price and Norris recently documented several instances in which individuals who had been involuntarily committed for mental illness were able to purchase a firearm and used it fatally. Marilyn Price & Donna Marie Norris, Firearm Laws: A Primer for Psychiatrists, 18 HARV. REV. PSYCHIATRY 326, 328 (2010).


21. ATF PUBL’N, supra note 18, at 3.


23. Wiebe, supra note 22.
must find narrow and accurate ways to identify individuals who are unlikely to use firearms safely.

IV. REGULATING PEOPLE, NOT ARMS

Successfully reducing firearms-related violence requires effectively identifying dangerous individuals and keeping firearms out of their hands. However, both are difficult, if not impossible. Categorical restrictions, which are designed to protect the public with minimal infringement on Second Amendment rights, paradoxically threaten both public safety and individual rights. Indeed, arms proponents concede that predictions of dangerousness are at once inaccurate and insufficient as a means of protecting the public, going so far as to suggest that a safe public is a universally armed public.\(^\text{24}\)

Prospectively identifying dangerous individuals is fraught with error. Research is exceptionally limited but suggests that any increased risk in violence is extremely modest, if at all.\(^\text{25}\) If there is an inflated risk of violence, it is associated with minor acts, not fatal shootings.\(^\text{26}\) Even those recently discharged from mental institutions are no more likely to be violent than their peers, unless they suffer from a comorbid substance abuse problem or have a history of violence.\(^\text{27}\) In fact, it is those who have not yet been diagnosed who may pose the most risk, as

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certain untreated mental illnesses leave a person with less control over his thoughts and actions. Nonetheless, restrictions on the sale of firearms are based on the defined thresholds of involuntary commitment, adjudicated dangerousness, and receipt of verdict of not guilty by reason of insanity. Because these proxies often follow rather than precede acts of violence, they have limited utility.

Not only can prohibited persons access firearms, but removing firearms post purchase is even more problematic. Only a minority of states require a license to purchase or possess a handgun, some of which remain valid for years or indefinitely. Even where states have the capacity to match adjudications with purchasing records, law enforcement lack the resources to track down and remove weapons from prohibited persons. An estimated 200,000 individuals have legally purchased a gun and subsequently lost competence to safely operate it.

Categorical restrictions do not reliably keep firearms from violent persons. Nearly 3 million individuals meet the criteria for firearms restrictions relating to mental illness, but only a few hundred thousand are listed in the NICS. Regulating people and not firearms will always prove deficient in the wake of the next tragedy. Nevertheless, even imperfect legislation must

28. Indeed, Jared Loughner’s teachers and classmates had noticed bizarre behavior in the months leading up to his homicidal actions. The school asked him to take a leave of absence until he sought mental health evaluation, but no one reported him to the authorities, or even to a mental health professional. Kirk Johnson et al., Suspect’s Odd Behavior Caused Growing Alarm, N.Y. TIMES, Jan. 10, 2011, at A1, available at http://www.nytimes.com/2011/01/10/us/10shooter.html. In other notorious shootings, schools have done much less (e.g., Virginia Tech, Columbine).

29. California is the only state to have implemented a system to match purchasing records with subsequent loss of competency. There, authorities rely on the Armed Prohibited Persons System to track down at least those individuals who have purchased a handgun (rifles and shotgun purchases are not monitored). Yet with nearly 20,000 names in the system, police lack the manpower to track down and remove weapons from all of these persons’ homes; some departments have not even accessed the database. Ed Connolly & Michael Luo, States Struggle to Disarm People Who’ve Lost Right to Own Guns, N.Y. TIMES, Feb. 6, 2011, at A1, available at http://www.nytimes.com/2011/02/06/us/06guns.html.

30. Id.

protect patient privacy and dignity.

V. CONFIDENTIALITY

Mental health records contain sensitive information and fear of disclosure may dissuade individuals from being honest with physicians or even seeking treatment. Nonetheless, the Supreme Court has upheld restrictions on access to firearms based on involuntary commitment or adjudication as a "mental defective," meaning that gun control laws circumvent medical privacy laws, subjecting mentally ill patients to unwanted and unauthorized disclosure of treatment and diagnosis details. Overinclusive reporting policies (e.g., of diagnosis or outpatient treatment) unnecessarily infringe on medical privacy and deter patients from seeking care.

Individuals waive the right to privacy when purchasing firearms from a licensed dealer. Buyers complete firearms transaction records that fully disclose—subject to federal prosecution—personal information including current addiction to controlled substances, past involuntary commitments, or adjudication as "mentally defective," which the Department of Justice can both access and release freely. In other words, the buyer retains no expectation of privacy in disclosed information; the form is inspected not only by the seller, but also by state or federal agents in connection with a criminal investigation or annual inspection of the dealer. Although the NICS limits otherwise unauthorized access, the Department of Justice is free to release this information "without regard for privacy or confidentiality." Moreover, should a purchaser challenge a denial of a state permit or license, courts will allow disclosure of mental health records to determine whether the application for

34. § 923(g).
35. Id. § 923(g)(1)(D); Marchant, 55 F.3d at 513, 516.
licensure was properly denied.  

Privacy intrusions occur at the state level as well. The Gun Control Act does not require states to safeguard privacy such as by prohibiting overreporting, disclosure to nonessential personnel, or release of diagnosis. State law often requires mental health professionals to alert authorities if a patient is dangerous to himself or herself or to others. For example, Illinois inpatient facilities must report involuntary hospitalizations to the police for inclusion in the NICS. Five states explicitly require arms purchasers to waive confidentiality of all mental health records.

Tracking individual mental health histories in federal and state databases contravenes the purpose of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), a federal law protecting against unauthorized disclosure of individual health information. The Privacy Rule, created by regulations implementing HIPAA, prohibits health care providers, plans, or clearinghouses (i.e., billing agencies) from disclosing identifiable health information without a patient’s written consent or in connection with payment or treatment. Nonetheless, the Privacy Rule expressly does not vitiate other laws requiring disclosure, such as the Brady Handgun Violence Prevention Act (creating the NICS) or state laws requiring gun purchasers to waive confidentiality to mental health records. In fact,

39. Id.
41. 45 C.F.R. § 164.502 (2010).
identifiable health information may be released broadly as required by law—for public health activities, in response to an order of a court, for law enforcement purposes, or to avert a serious threat to health or safety.43

A system of gun control that relies on easily accessible mental health records creates a fundamental threat to basic privacy principles. The medical privacy of mental health records is of paramount importance due to the stigma associated with mental illness, and the deeply personal information contained in them; disclosure can result in personal embarrassment or even discrimination. Fear of disclosure can dissuade individuals from being honest with their providers, or even seeking treatment. Thus, special protections of medical privacy have been enacted, but are often trumped by concerns for public safety. For example, a therapist cannot reveal confidential patient information in state or federal court, but must alert authorities if the patient presents a danger to himself or third parties.44 Privacy protections are built into all federal and state laws that relate to mental health restrictions, but are at inherent tension to the purpose of the restrictions—to easily identify prohibited persons. Balancing confidentiality of health records with the accessibility of a NICS will create perpetual tension.

VI. CREATING CONSTRUCTIVE AND CONSTITUTIONAL ARMS RESTRICTIONS?

Given the ineffectiveness of current restrictions on access to firearms for “dangerous” individuals with mental illness, the government must improve safeguards against firearm-related violence. The NRA’s approach—to arm the public—is an untenable solution, given the well-established relationship between gun ownership and fatalities, both intentional and accidental. While the current interpretation of the Second Amendment leaves us all at heightened risk for gun violence, Congress could enact sensible reforms to the Gun Control Act

43. 45 C.F.R. §§ 164.512(a), (b), (e), (f), (j) (2010).
that would reduce the frequency with which the inevitable occurs—that widely available arms are placed in the wrong hands.

The NRA’s suggestion that public safety from murderous intent requires a universally armed public flies in the face of all available evidence. Currently, there is one death per day for every civilian gun owned.\textsuperscript{45} The presence of a firearm in a home makes residents more likely to be fatally shot—whether by accident or intentional action.\textsuperscript{46} Moreover, the attempt to filter arms out of the hands of the dangerous has failed; use of the NICS has not lowered firearm related homicide and suicides,\textsuperscript{47} even though the number of mentally ill persons listed has increased significantly since 2007.\textsuperscript{48} This is not surprising, given that most violent acts are not committed by the mentally ill.\textsuperscript{49} Fatalities have only declined in states with universally strict firearms control (e.g., Massachusetts, New York, and New Jersey).\textsuperscript{50} These effective laws are of the very type at risk of Constitutional scrutiny, given the Court’s recent interpretation of

\textsuperscript{45} In 2007, there were approximately 85 deaths caused by guns per day. Gun Violence Statistics, LEGAL COMMUNITY AGAINST VIOLENCE, http://www.lcav.org/statistics-polling/gun_violence_statistics.asp#f37 (last visited Feb. 6, 2012). There are approximately 90 guns for every 100 people. Id.


\textsuperscript{47} Price & Norris, supra note 17, at 328.

\textsuperscript{48} The NICS Improvement Amendments Act of 2007, passed in the wake of the Virginia Tech shootings, created incentives to encourage state reporting into NICS (e.g., awarding grants to fund creation and maintenance of state databases and imposing financial penalties for failure to do so). In response, states have expanded the scope of reporting (including patients committed for fourteen days instead of only ninety and patients admitted to private as well as public hospitals). See, e.g., WASH. REV. CODE § 71.05.240 (2009) (expanding the definition of mentally ill triggering reporting to include those committed for fourteen days); 740 ILL. COMP. STAT. 110/12 (2009) (requiring reporting of patients in private as well as public hospitals). Reporting of mentally ill increased by thirty seven percent in 2009. See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, NCJ 231679, BACKGROUND CHECKS FOR FIREARMS TRANSFERS 2009–STATISTICAL TABLES (2010), available at http://bjs.ojp.usdoj.gov/content/pub/html/bcft/2009/bcft09st.pdf.

\textsuperscript{49} Swanson, supra note 25.

\textsuperscript{50} Luo, supra note 22.
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the Second Amendment.

Thus, Congress should adopt five sensible reforms, which the Supreme Court would likely uphold: (1) ban large-sized ammunition magazines,51 (2) withhold state funding for inadequate privacy protections, (3) ensure more rapid and reliable background checks, (4) require longer waiting periods,52 and (5) close the gun show loophole.53 Progress has begun: President Obama called for change in the wake of the attack on Representative Giffords, citing the need for a “faster and nimbler” background check system,54 and two bills recently introduced to the House and Senate would ban oversize ammunition magazines, penalize states for incomplete reporting to NICS, and close the loophole that allows unregulated sellers to use gun shows as a sales floor.55 Legislators must take seriously the epidemic of firearms-related violence in the United States.

51. Several states already limit the number of rounds one can purchase in a single magazine. E.g., CAL. PENAL CODE § 12020(a)(2), (c)(25) (West 2002) (setting a magazine round restriction of no more than ten); HAW. REV. STAT. § 134-8(c) (West 2006) (no more than ten); MASS. GEN. LAWS ANN. ch. 140, §§ 121, 131M (West 2006) (no more than ten); MD. CODE ANN., CRIM. LAW § 4-305(b) (West 2006) (no more than twenty); N.J. STAT. ANN. §§ 2C:39-1(y), 2C:39-3(j), 2C:39-9(h) (West 2006) (no more than fifteen); N.Y. PENAL LAW §§ 265.00(23), 265.02(8) (McKinney 2006) (no more than ten); see also Violent Crime Control and Gun Prevention Act, H.R. 3131, 103rd Cong. (1993) (banning large capacity ammunition feeding devices and setting the limit at ten rounds; this Bill was enacted in 1994, but expired in 2010).

52. The risk of suicide by firearm is fifty-seven times higher in the first week of purchasing handgun than in normal population. Garen J. Wintemute et al., Mortality Among Recent Purchasers of Handguns, 341 NEW ENG. J. MED. 1583, 1585 (1999).

53. There are two bills currently before the House and Senate to amend the Brady Act—the first of which requires gun show operators to register with the Attorney General and submit to random inspection. Gun Show Loophole Closing Act of 2011, H.R. 591, 112th Cong. (2011). The second proposal requires a licensed dealer selling to an unlicensed buyer to report the transaction to the Attorney General within thirty days. Gun Show Background Check Act of 2011, S. 35, 112th Cong. (2011).


VII. CONCLUSION

“Violence in American politics tends to bubble up from . . . a murky landscape where worldviews get cobbled together from a host of baroque conspiracy theories, and where the line between ideological extremism and mental illness gets blurry fast.”56

Ross Douthat, United in Horror

It is clear that a majority of the Supreme Court believes that the Second Amendment protects an individual right to bear arms, leaving governments to regulate dangerous persons, rather than dangerous weapons. Yet the longstanding prohibitions against arms possession by the mentally ill have proved ineffective at keeping arms out of the hands of the violent. Short of universal regulations, reliably keeping dangerous arms out of the hands of the violent is impossible, yet the struggle to protect the public’s health cannot be defeated by the recent expansive interpretation of the Second Amendment. To the extent that restrictions within this scope will keep arms away from violent individuals, they offer reason for hope. Yet to the extent that restrictions further infringe on the mentally ill’s right to privacy without providing comprehensive arms control, they likely will do more harm than good. In the wake of the most recent carnage and the newly robust right to bear arms, we must be very careful to maintain the dignity and human rights of the mentally ill as we push forward with our longstanding prohibitions against the right to bear arms.

WHO OWNS THE SOUL OF THE CHILD?: AN ESSAY ON RELIGIOUS PARENTING RIGHTS AND THE ENFRANCHISEMENT OF THE CHILD

Jeffrey Shulman

I. INTRODUCTION: WHAT DOES ARMAGEDDON HAVE TO DO WITH BETTY SIMMONS?

“For the most part we do not first see, and then define, we define first and then see.”

Walter Lippman, Public Opinion

* Associate Professor, Legal Research and Writing, Georgetown Law. J.D., Georgetown Law; Ph.D., University of Wisconsin-Madison. I am deeply indebted to Dean William Treanor and Professor Robin West, Associate Dean, Research and Academic Programs, Georgetown Law, for their encouragement. This article was supported by a grant from Georgetown Law. A version of this paper was presented at Luther College as part of its 2010–2011 program of the Center for Ethics and Public Life. My gratitude to William Craft, former Dean and Vice President, Academic Affairs, and current President, Concordia College (Moorhead, Minn.); John Moeller, Director, the Center for Ethics and Public Life; and the vibrant students of Luther College. Thanks to David Wolitz, whose intellectual generosity, upon which I have called time and again, is—most fortunately, for me—seemingly inexhaustible.

Betty Simmons was nine years old when she accompanied Sarah Prince, her aunt and guardian, to distribute religious literature on the streets of Brockton, Massachusetts.\(^2\) Mrs. Prince did not ordinarily permit Betty to engage in preaching activity on the streets at night, but on the evening of December 18, 1941, she reluctantly yielded to Betty’s entreaties and (perhaps more difficult to resist) her tears.\(^3\) Both Mrs. Prince and Betty were Jehovah’s Witnesses, for whom street preaching is a religious duty.\(^4\) For Betty, street preaching was work commanded by the Lord, but it was work that she loved to do. It was a way of worshipping God.\(^5\) For the legislators of Massachusetts, however, Betty’s religious work was something else entirely: a violation of the state’s child labor laws. These statutes prohibited children from selling or offering to sell “any newspapers, magazines, periodicals or any other articles of merchandise of any description . . . in any street or public place.”\(^6\) Criminal sanctions were imposed on parents and guardians “who compel or permit minors in their control to engage in the prohibited transactions.”\(^7\) Sarah Prince was convicted on several counts, and, for the most part, the judgment of the trial court was affirmed by the Supreme Court of Massachusetts.\(^8\) Mrs. Prince appealed to the United States Supreme Court.\(^9\)

The case of *Prince v. Massachusetts* is well known for its conclusion that “the family itself is not beyond regulation in the public interest, as against a claim of religious liberty.”\(^10\) In *Prince*, the Court stressed that the state, acting as *parens patriae*—acting, that is, in its capacity as protector of those unable to protect themselves—is responsible for the general
welfare of young people. As parens patriae (literally, as parent of the country), the state may protect children against the misconduct of their own parents and guardians. The state’s parens patriae authority, according to the Prince Court, is “not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience.” Pointing to a number of state regulations (such as child labor and compulsory schooling laws) that interfered with religious parenting rights, the Court rejected Mrs. Prince’s contention that such regulations can be justified only by a clear and present danger to the child. While a regulation of adult religious activity might require the state to show that it had a truly compelling justification, no such showing was necessary where children are involved. “The state’s authority over children’s activities,” the Court insisted, “is broader than over like actions of adults.” Thus, the Court concluded that the state was required to show only that it had a legitimate (not a compelling) interest to promote the public’s health, welfare, or safety, and that it had used a means—here, a restriction on commercial activity by children—reasonably related to its purpose (not the least restrictive means possible). Child labor laws served “the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.” For the Court, it was simply too late to doubt that legislation designed to protect children is within the state’s police power, “whether against the parent’s claim to control of the child or one that religious scruples dictate contrary action.” Mrs. Prince was not entitled to an exemption

11. Id.
12. Id. at 166–67.
13. Id. at 166.
14. Id. at 166–167.
15. Id. at 167–168.
16. Id. at 168.
17. Id. at 170–71.
18. Id. at 165.
19. Id. at 168–69.
from the general law of the state regulating child labor.\textsuperscript{20}

Its focus on the welfare of the child notwithstanding, the \textit{Prince} Court managed to ignore the real child whose welfare was the central issue of this landmark case. For one thing, no one on the Court suggested that Betty may have been too young to choose such a strong religious commitment. Writing for the Court, Justice Rutledge noted that “Betty believed it was her religious duty to perform this work and failure would bring condemnation ‘to everlasting destruction at Armageddon.’”\textsuperscript{21} On this point, the Court’s four dissenting justices agreed with the majority: Betty wanted to accompany her aunt, motivated to engage in missionary evangelism by her love of the Lord.\textsuperscript{22} Mrs. Prince’s brief to the Court also stressed that Betty “desired to serve Almighty God.”\textsuperscript{23} Her service was freely given to the Lord. In Mrs. Prince’s words:

[\textit{Betty}] was serving Jehovah God and not her guardian, not any man, not the society or any earthly institution. The girl desired to pay her vows unto her God. Since she was thus serving Jehovah it cannot be said that she was working for any creature on earth. No man or government has authority to punish a child or another creature because the child is permitted to serve Jehovah God.\textsuperscript{24}

From this point of view, Betty’s street preaching was not child labor at all.

No constitutional truism is more universally accepted than Justice Jackson’s famous assertion, in \textit{West Virginia State Board of Education v. Barnette}, that “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”\textsuperscript{25} In \textit{Barnette}, the Supreme Court

\begin{itemize}
  \item \textsuperscript{20} \textit{Id}.
  \item \textsuperscript{21} \textit{Id.} at 163.
  \item \textsuperscript{22} See \textit{id.} at 171–72 (Murphy, J., dissenting).
  \item \textsuperscript{23} Brief for Appellant at 34, \textit{Prince}, 321 U.S. 158 (No. 98).
  \item \textsuperscript{24} \textit{Id}.
  \item \textsuperscript{25} 319 U.S. 624, 642 (1943); cf. \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 15–16 (1947) (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one

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protected school children against the action of local authorities, who, by compelling the flag salute and pledge, had “transcend[ed] constitutional limitations” on the authority of the state. The injury caused by such a compelled statement of belief was a grievous one, a blow to the intellectual and moral personhood of the young children. The compulsory flag salute and pledge “require[d] affirmation of a belief and an attitude of mind.” By forcing the children to utter what was not in their minds, the state had invaded “the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”

religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

27. Id. at 633.
28. Id. at 634.
29. Id. at 642. On the First Amendment as protective of individual dignity, see, for example, Cohen v. California, 403 U.S. 15, 24 (1971) (“The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”) (emphasis added); cf., e.g., Stephen Arons & Charles Lawrence III, The Manipulation of Consciousness: A First Amendment Critique of Schooling, 15 HARV. C.R.-C.L. L. REV. 309, 312 (1980) (“The first amendment is . . . a statement of the dignity and worth of every individual.”); Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 YALE L.J. 877, 879 (1963) (“[E]xpression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted. Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man’s essential nature.”); Abner S. Greene, The Pledge of Allegiance Problem, 64 FORDHAM L. REV. 451, 483 (1995) (“Compelling people through threat of legal sanction to say words that they don’t want to say is as much an affront to
In the catalogue of opinions not subject to official prescription, religion occupies a privileged place. The Constitution’s commitment to religious freedom arises from the assumption that religious principles are uniquely the dictates of conscience. Because religion is, as James Madison put it, “the duty which we owe to our Creator . . . it can be directed only by reason and conviction, not by force or violence.” 30 Not, that is, by the state. Even a benign expression of religious views by the state “may end in a policy to indoctrinate and coerce,” calling into question the voluntariness, and thus the genuineness, of belief. 31 “A state-created orthodoxy,” the Court has said, “puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.” 32

But, for children, the threat to freedom of belief and conscience is no less grave when it comes from private orthodoxies, and the injury to the child caused by private coercion is no less grievous. The realm of intellect and spirit is invaded when children are forced to believe what other people believe, or kept from believing what other people do not believe, even if—and, perhaps, especially when—those “others” are their parents or religious mentors. Yet children are left legally unprotected from most forms of private religious coercion. Indeed, where the religious upbringing of children is involved, freedom of belief can lose its customary meaning. Somehow, Betty’s fear of “everlasting destruction” showed that her evangelical desires were the product of free choice. The Court did not pause to consider whether Betty’s religious training had left her unable to choose—freely to choose, or freely to reject—the religious commitments of her guardian. Theologically, we might wonder how free a young child can be to make religious choices

dignity as many other laws the Court has invalidated.”).  
32. Id.
when the consequences of choosing wrongly are so stark. More relevant to the Court’s work, we should wonder what it means for the psychological welfare of a child to believe that her own conduct—or, in Betty’s view, misconduct—could bring about her everlasting destruction.

The Supreme Court did not stop to think about such things. It held against Mrs. Prince on the dubious basis that street preaching was dangerous work for children. But the Court chose to overlook a real risk of harm to Betty: the threat posed by a religious regime that makes genuine choice and real faith difficult, if not impossible. Or perhaps it should be said not that the Court ignored this harm, but that it could not see it. The Court could not see the possibility that Betty’s obedience was the product not of choice, but of the loss of choice, of childlike surrender to a familial authoritarianism. The danger of emotional maltreatment was hidden in plain sight, but the Court could not challenge the cultural norm that parents have the right to form the religious beliefs of their children. The Court was incapable of asking, What does Armageddon have to do with Betty Simmons?

II. A TALE OF TWO LIBERTIES

Sarah Prince rested her case on two liberties: the right of religious freedom (as guaranteed by the Free Exercise Clause of the First Amendment) and the right to parent (under the Due Process Clause of the Fourteenth Amendment). This combination of constitutional claims, as the Court observed, was an especially tough bulwark against state regulation: “The parent’s conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters.” From Mrs. Prince’s point of view, the state of Massachusetts had struck a blow at the parent’s right of religious mentorship. It was abundantly clear to Mrs. Prince that the state did not have the authority to interfere with this most sacred of religious duties

34. Id. at 165.
and most natural of rights. The family was “the backbone of all orderly governments,” she argued; it was the source of a child’s moral and social values. The family preceded and transcended the authority of the state. “The family and home are institutions in their own right[,]” Mrs. Prince argued. “They do not depend upon government for their creation. Long before organized government was established these institutions prevailed to secure the perpetuation of humanity.”

The role of the democratic state, accordingly, is “to protect and conserve the parental authority over children . . . regardless of how misguided others may think that appellant [i.e., Mrs. Prince] is in the spiritual education of the child and the practice of preaching according to the dictates of her conscience.” Mrs. Prince could not follow the dictates of her conscience if she allowed Betty to stray from the true path. Really, then, for Mrs. Prince, there were not two liberties at stake; rather, the right of religious freedom and the right to parent were inseparably wound together. The state could not strike at one without damaging the other.

Mrs. Prince would lose this battle, but the struggle to secure religious parenting rights, though a prolonged one, would be largely successful, and that success would be due in no small part to the idea that religious parenting joins two indefeasible rights in indissoluble union. Today, religious parenting rights enjoy a special constitutional protection from state regulation. State action that burdens religious parenting is subject to heightened judicial scrutiny (the kind of scrutiny that Mrs. Prince argued for), subject, that is, to the “strict scrutiny” that is strict in theory but most often fatal in fact. This is a degree of protection that neither the right of religious freedom nor the right to parent enjoys by itself.

Strict scrutiny is usually reserved for state action that impinges upon an individual’s fundamental rights (or

36. Id. at 17.
37. Id.
38. Id. at 18, 40.
discriminates against a group on impermissible grounds).³⁹ Most laws receive a far more deferential review.⁴⁰ Under “rational basis review,” courts presume the constitutionality of legislation.⁴¹ The party trying to overcome this presumption must show (1) that the law serves no legitimate purpose, or (2) that the means employed by the law has no rational relation to the law’s stated goal.⁴² Under a strict scrutiny standard, the court will presume that a law is unconstitutional.⁴³ To overcome that presumption, the state must show (1) that the law serves a compelling purpose, and (2) that the means employed by the law are as narrowly tailored as possible to achieve the law’s stated goal.⁴⁴ Because the hurdle of strict scrutiny is so difficult to clear, the level of review employed by the court can easily determine the outcome of a case.

Separately, neither the right of religious freedom nor the right to parent would trigger strict scrutiny. The Supreme Court has said, in Employment Division, Department of Human Resources of Oregon v. Smith, that state action restricting religious practice is constitutionally permissible unless it directly targets religious practice or discriminates against religious groups.⁴⁵ Nor do parents have a fundamental right to direct the upbringing of their children. The Supreme Court has used loose language about the fundamental right to parent, and this language has led to confusion among lower courts, but, as Justice Scalia has correctly observed, there is little support for the notion that the right to parent is a “substantive constitutional right,” let

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⁴⁰. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 720 (3d ed. 2009).
⁴¹. Id.
⁴². Id. (citing Pennell v. City of San Jose, 485 U.S. 1, 14 (1988); U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 175, 177 (1980); and Allied Stores of Ohio v. Bowers, 358 U.S. 522, 527 (1959)).
⁴³. Id. at 719.
⁴⁵. 494 U.S. 872, 879 (1990) (“[F]ree exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law prescribes (or prescribes) conduct that his religion prescribes (or proscribes).” (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring))).
alone a fundamental one. Combined, however, these rights form a constitutional firewall that shields parents from state interference in the religious upbringing of their children. For the Supreme Court also has said, in Wisconsin v. Yoder, that when the interests of parenthood are combined with a free exercise claim, “more than merely a ‗reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.” In these hybrid cases, strict scrutiny is warranted despite the fact that state action does not target religion or impinge upon a fundamental right.

46. Troxel v. Granville, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) (“Only three holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children—two of them from an era rich in substantive due process holdings that have since been repudiated.”) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923)); see also, e.g., Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir. 1996) (“The Supreme Court, however, has never expressly indicated whether this ‘parental right,’ when properly invoked against a state regulation, is fundamental, deserving strict scrutiny, or earns only a rational basis review. Our reading of the appropriate caselaw convinces us that rational basis review is appropriate.”); Brown v. Hot, Sexy and Safer Prod., 68 F.3d 525, 533 (1st Cir. 1995) (“[T]he Supreme Court has yet to decide whether the right to direct the upbringing and education of one’s children is among those fundamental rights whose infringement merits heightened scrutiny.”); Baker v. Owen, 395 F. Supp. 294, 299 (M.D.N.C. 1975) (“We reject Mrs. Baker’s suggestion that this right is fundamental, and that the state can punish her child corporally only if it shows a compelling interest that outweighs her parental right. We do not read Meyer and Pierce to enshrine parental rights so high in the hierarchy of constitutional values. In each case the parental right prevailed not because the Court termed it fundamental and the state’s interest uncompelling, but because the Court considered the state’s action to be arbitrary, without reasonable relation to an end legitimately within its power. Nor has the Court subsequently spoken of parental rights as fundamental; on the contrary, its references to them lend support to the view that they are not.”) (citations omitted), aff’d 423 U.S. 907 (1975) (per curiam). Broad claims are made for Meyer and Pierce. See, e.g., Richard W. Garnett, Taking Pierce Seriously: The Family, Religious Education, and Harm to Children, 76 NOTRE DAME L. REV. 109, 143 (2000) (describing Pierce as a “ringing endorsement of religious freedom and of limited government dominion over citizens”). But these seminal due process cases lend no support to the contention that the right to parent is fundamental.


48. See Smith, 494 U.S. at 881 (suggesting a history of strict scrutiny review for “Free Exercise Clause [claims] in conjunction with other
The “hybrid rights” doctrine survived Smith, though its scope was less than precisely defined. The Smith Court did make clear that the doctrine was an exception to general constitutional principles. But in the universe of religious parenting cases, the exception easily swallows the rule. Because such cases are hybrid by definition, strict scrutiny becomes the norm, and the result is the creation of a separate sphere of the law where the government’s ability to enforce the law is subject to an individual’s religious beliefs. In this sense, the Yoder Court did more than rescue Amish parents from state educational requirements. It created a private right to ignore generally applicable law. Though the Court appeared to step back from the implications of the decision by limiting its holding to the unique facts of the case, the spirit of strict scrutiny, once summoned, would not be easily cabined. Yoder became the precedential port from which a wealth of religious parenting cases would be launched, thus requiring courts to apply a rationale that contradicted constitutional tradition and common sense.

Where a hybrid claim is involved, the power of the parent may be limited by the state only “if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.” This harm standard protects religious parenting rights at too great a cost: It sacrifices the best interests of the child in order to bolster parental constitutional protections” and for free speech cases also involving freedom of religion, but determining that Smith “does not present such a hybrid situation”).

49. See Smith, 494 U.S. at 881–82.
50. See id. at 888 (applying strict scrutiny “across the board” would be “courting anarchy”).
51. See id. at 886 (compelling interest test would produce “a private right to ignore generally applicable laws”).
52. See Yoder, 406 U.S. at 229, 233 (“[T]he power of the state, as parens patriae, to extend the benefit of secondary education to children regardless of the wishes of their parents” cannot be sustained against a “free exercise claim of the nature revealed by this record.”) (emphasis added); id. at 236 (observing that the Court’s judgment would apply to “few other religious groups or sects”).
53. See Smith, 494 U.S at 885 (“To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs . . . contradicts both constitutional tradition and common sense.”).
authority. It is a cost that children should not be asked to bear. The Supreme Court famously said as much to Sarah Prince: While parents may be free to become martyrs themselves, “it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”

III. A GUARANTEE OF FREE CHOICE

In West Virginia State Board of Education v. Barnette, Justice Jackson wrote that public education is not free if its delivery is tied to ideological strings: “Free public education, if faithful to the ideal of secular instruction and political neutrality will not be partisan or enemy of any class, creed, party, or faction.” Really, though, Jackson was not advocating ideological neutrality. His words are a call to “individual freedom of mind in preference to officially disciplined uniformity.” Education is to nourish the “free mind” of the child. For the happily pre-postmodern Jackson, the freedom to think for oneself is not just another form of official discipline. It is the liberal and liberating ideology at the heart of our constitutional order.

The Supreme Court has consistently put its faith in intellectual independence. Freedom of mind is supported by specific constitutional guarantees, such as the freedoms of speech and religion; and, taken together, these liberties guarantee what constitutional law scholar Laurence Tribe has described as “a capacious realm of individual conscience . . . a ‘sphere of intellect and spirit’ constitutionally secure from the machinations and manipulations of government.” Or, as Justice Stewart more

56. 319 U.S. 624, 637 (1943); cf. Everson v. Bd. of Educ., 330 U.S. 1, 23–24 (1947) (Jackson, J., dissenting) (The public school “is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.”).
57. Barnette, 319 U.S at 637 (emphasis added).
58. Laurence H. Tribe, American Constitutional Law § 15-5, at 1315 (2d ed. 1988) (“The Constitution has enumerated specific categories of thought and conscience for special treatment: religion and speech. Courts have at times
simply said, “The Constitution guarantees . . . a society of free choice.” 59

The *Prince* Court set these principles to work. While “the custody, care and nurture of the child reside first in the parents,” 60 and while parents enjoy the right “to give [children] religious training and to encourage them in the practice of religious belief,” 61 neither rights of religion nor rights of parenthood are beyond limitation. 62 To guard the general interest in youth’s well-being, the Court maintained, the state may limit parental authority in things affecting the child’s upbringing, including matters of conscience and religious conviction. 63 The state’s wide range of power is directed to ensure the welfare of both the child and society. Indeed, properly understood, the child’s interest and the general interest are one and the same. For its continuance, the Court explained, “[a] democratic society rests . . . upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.” 64 But what does that imply? What is “healthy, well-rounded growth”? What does “full maturity” mean? The Court’s answer was decidedly non-authoritarian: “It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.” 65 A

properly generalized from these protections . . . to derive a capacious realm of individual conscience, and to define a sphere of intellect and spirit constitutionally secure from the machinations and manipulations of government.” (internal quotation marks and footnotes omitted)).

59. Ginsberg v. New York, 390 U.S. 629, 649 (1968) (Stewart, J., concurring in the result) (“The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a ‘free trade in ideas.’ To that end, the Constitution protects more than just a man’s freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice.” (footnote omitted)).

60. *Prince*, 321 U.S. at 166.
61. *Id.* at 165.
62. *Id.* at 166.
63. *Id.* at 165–70.
64. *Id.* at 168.
65. *Id.* at 165.
democratic society rests on a model of maturation that takes as its norm the individual’s full capacity to make free and independent choices. This capacity, as the Supreme Court has affirmed on many occasions, is both the presupposition and the product of our First Amendment freedoms. The guarantee of a society of free choice “presupposes the capacity of its members to choose.”

It follows, then, that it is a primary duty of parents to nourish this capacity. It does not follow that parents need abandon the role of religious mentor and guide (not that it would be possible: non-mentoring would itself be a form of mentoring; it would hardly be practical, or helpful to children, to adopt some ideologically neutral model of parenting). In a democracy, political theorist William Galston writes, “parents are entitled to introduce their children to what they regard as vital sources of meaning and value, and to hope that their children will come to

66. See, e.g., Ginsberg v. New York, 390 U.S. 629 (1968); see also Chemerinsky, supra note 40 (listing the advancement of personhood and autonomy as a major rationale for protecting freedom of speech).

67. Ginsberg, 390 U.S. at 649 (Stewart, J., concurring in the result) (“[T]he Constitution protects more than just a man’s freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose.”).

68. Cf. Stanley Ingber, Socialization, Indoctrination, or the “Pall of Orthodoxy”: Value Training in the Public Schools, 1987 U. ILL. L. REV. 15, 16 (1987) (“The image of an individual unimpeded by any preconditioning . . . is a fiction. People acquire their values because of innumerable influences upon their lives: the influence of parents; of the family church; of the schools they were required to attend; of their relatives, friends, and neighbors; of writers; and of many others. By thus being indoctrinated into society the individual obtains the frame of reference necessary for actively making decisions, rather than passively receiving impulses.”). The same reasoning applies to the state as educator. Cf. Richard Arneson & Ian Shapiro, Democratic Autonomy and Religious Freedom: A Critique of Wisconsin v. Yoder, in DEMOCRACY’S PLACE 137, 160 (Ian Shapiro ed., 1996) (“Even if it were somehow possible for an educational regime to abstain from inculcating values in the child, this would not be sensible; for the vacuum left by abstaining educators would be filled by other causal influences . . . . At any rate, the phenomenon of choice of values by an individual, which we associate with attainment of autonomy, always presupposes a context in which some standards and values are at least provisionally fixed and guide choice.”).
share this orientation.”69 For many, the most vital source of meaning and value is their religious faith, and it should go without saying that parents may introduce their children to what they regard as spiritually true, and to hope that their children will come to share a similar religious orientation.

But this simple proposition raises surprisingly tough questions about the parent-child relationship. Parents may introduce their children to vital sources of meaning, but what limits, if any, can be placed on this introduction? Parents may hope that their children will come to share their values, but how far can parents go to make this hope a reality? If, as it seems, Galston writes with some caution, there is good reason for it, because, as he also observes, children have freestanding intellectual and moral claims of their own, claims that “imply enforceable rights of exit from the boundaries of community defined by their parents.”70 If not the mere creature of the state,71 the child is more than a placid reflection of the parental image. In a liberal democracy, the care of children resides first in the parents, but not first and last.


70. Id. at 104 (“At a minimum, the children's freestanding religious claims imply enforceable rights of exit from the boundaries of community defined by their parents. I would add that the exit rights must be more than formal. Communities cannot rightly act in ways that disempower individuals—intellectually, emotionally, or practically—from living successfully outside their bounds.”). On exit rights within intimate relationships, see also Susan Moller Okin, Justice, Gender, and the Family 136–38 (1989).

71. See Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”); cf. Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (“In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.”).
If children have a right to leave behind the boundaries set by their parents, then they must be able to exercise that right freely. They must not be disempowered from making their own intellectual and moral claims in the first place. What must be protected is the child’s future right to make those claims; what must be secured is the child’s present opportunity to develop the capacity to make those claims. Ideally, it would be part of the parent’s task to safeguard the child’s right to moral autonomy;

72. The idea that the child’s capacity to form dissenting beliefs should be protected from ideological coercion by state actors finds broad support from First Amendment theorists. On the First Amendment and the protection of belief formation as well as expression, see, for example, Ingber, supra note 68, at 16 (“To allow officials to inculcate values is to admit that free speech protects expression only so long as the speaker has been conditioned to say what those in authority accept. In a society of such preconditioned speakers, freedom of speech is virtually irrelevant.”); Nadine Strossen, “Secular Humanism” and “Scientific Creationism”: Proposed Standards for Reviewing Curricular Decisions Affecting Students’ Religious Freedom, 47 OHIO ST. L.J. 333, 370 (1986) (“A second reason why the minds of public school students should be especially shielded from governmental influence is that, due to their youth, the students are relatively impressionable and susceptible. Consequently, to maintain the integrity of the process by which public school students form their own beliefs, it is especially important to insulate them from any potentially coercive governmental influence. Society has a significant stake in preserving the free minds of its youth, because it depends upon them to defend and maintain this country’s democratic, civil libertarian institutions and traditions.” (footnotes omitted)); Tyll van Geel, The Search for Constitutional Limits on Governmental Authority to Inculcate Youth, 62 TEX. L. REV. 197, 261 (1983) (“[I]t would make a mockery of the protection of an adult’s freedom of belief if the government could pre-condition his beliefs by indoctrinating him during childhood.”); Arons & Lawrence III, supra note 29, at 312 (“Free expression makes unfettered formulation of beliefs and opinions possible. In turn, free formulation of beliefs and opinions is a necessary precursor to freedom of expression . . . . The more the government regulates formation of beliefs so as to interfere with personal consciousness, the fewer people can conceive dissenting ideas or perceive contradictions between self-interest and government-sustained ideological orthodoxy. If freedom of expression protected only communication of ideas, totalitarianism and freedom of expression could be characteristics of the same society.”).

but where the transmission of religious belief is involved, it is acceptable for parents to enforce spiritual conformity from their children, demanding (often in a loving and compassionate voice) uncritical obedience toward religious authority. It is only natural for parents to want a child to embrace their values, to believe their beliefs, and the legal system, as it ought, leaves parents free to transmit their religious values; but parents abuse that freedom when they give children no real opportunity to embrace other values and to believe other beliefs.

Young children lack the capacity to assert, or to choose not to assert, a personal religious identity. Those who mentor a child, therefore, assume a fiduciary duty to protect his or her prospective religious autonomy.\textsuperscript{74} This caretaking is no easy

\textsuperscript{74} Cf. Ira C. Lupu, \textit{Home Education, Religious Liberty, and the Separation of Powers}, 67 B.U. L. REV. 971, 976–77 (1987) ("The legal tradition of authorizing parents to speak for their offspring need not become a device by which children are made to disappear. Children, not fully competent to make decisions because of insufficient awareness of the decisions' long-term consequences, are normally subject to parental control. Parents are presumptively trustworthy decisionmakers for their children because parents generally feel affection for their young and are knowledgeable about their interests. Custodial power of this sort is never absolute, however, for it is based on a theory of fiduciary obligation. If the custodian mistreats his ward, public or private remedies designed to protect the child may be available." (footnotes omitted)). On the same principle, see James G. Dwyer, \textit{Religious Schools v. Children's Rights} 62–101 (1998) (arguing that the law should grant parents a legal privilege to care for children only in ways consistent with their best temporal interests); Arneson & Shapiro, supra note 68, at 138 ("[T]he relationship between parents and children is best thought of as one of trusteeship."); Barbara Bennett Woodhouse, \textit{Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family}, 8 B.Y.U. J. PUB. L. 321 (1994) (urging reform of family rights discourse by making children's needs the basis of parental authority); Barbara Bennett Woodhouse, \textit{Hatching the Egg: A Child-Centered Perspective on Parents' Rights}, 14 CARDOZO L. REV. 1747 (1993) (considering how a parental rights orientation undermines the nurturing values necessary to children's welfare). See generally Jeffrey Shulman, \textit{The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?}, 89 Neb. L. REV. 290 (2010); Elizabeth S. Scott & Robert E. Scott, \textit{Parents as Fiduciaries}, 81 Va. L. REV. 2401 (1995). But see Thomas H. Murray, \textit{The Worth of a Child} 61 (1996) ("[P]arenthood as stewardship still has its shortcomings as a model for parent-child relations. As a description of a relationship, it connotes disinterestedness, selflessness, a sort of benign but emotionally distant concern for the welfare of the child. This fits poorly with the intensity, love, and intimacy we prize between parents and children.").
Parents may find it troublesome enough when a child does not live by their political or cultural values. But the questioning or outright rejection of parental religious values is likely to occasion a more profound disappointment. Religious principles are dictates that run deeper than politics and culture. Nonetheless, religious freedom for the parent ought not to come at the cost of spiritual servitude for the child, and courts ought not to treat parental rights as though they could be divorced from parental duties. Like adults, children must be free to seek, as well as to find, a spiritual home.

75. Cf. James G. Dwyer, Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights, 82 CALIF. L. REV. 1371, 1389 (1994) (noting that court decisions subsequent to Yoder “have continued to advance an interpretation of free exercise rights that effectively treats children as non-consenting instruments or means to the achievement of other persons’ ends, rather than as persons in their own right, with interests of their own that are deserving of equal respect”). For a parentalist point of view, see, for example, Karen Gushta, Should Big Brother Shape Your Child's Soul?, STOP THE WAR ON CHILDREN (April 8, 2011, 7:32 AM), http://stopthewaronchildren.wordpress.com/2011/04/08/should-big-brother-shape-your-child%E2%80%99s-soul/ (“[T]here are those who want to take away the right of custodial parents to determine what influences and ideas their children should be exposed to. This is the heart of education, which by definition is intended, directed learning. The issue at stake is not ‘who owns the soul of the child,’ but who has the right to shape it.”).  


To become autonomous is to come to be able to find and live in accordance with one’s own law.

I speak of “becoming” autonomous because I think it is not a quality one can simply posit about human beings. We must develop and sustain the capacity for finding our own law, and the task is to understand what social forms, relationships, and personal practices foster that capacity. I use the word “find” to suggest that we do not make or even exactly choose our own law. The idea of “finding” one’s law is true to the belief that even what is truly one’s own law is shaped by the society in which one lives and the relationships that are a part of one’s life. “Finding” also permits an openness to the idea that one’s own law is revealed by spiritual sources, that our capacity to find a law within us comes from our spiritual nature. From both perspectives, the law is one’s own in the deepest sense, but not made by the individual; the individual develops it, but in connection with others; it is not chosen, but recognized. “One’s own law” connotes
Compelled religious belief is an affront to the child’s dignity and worth. When children are forced to believe, they are required, by the dictates of someone else’s conscience, to forego the intellectual openness that “plays a vital role in the process of becoming an autonomous individual.” Such disrespect for the child can only beget habits of hypocrisy and meanness. Yet we permit parents to impose a presumed religious identity upon a child without the child’s consent or understanding. We permit religious parents to raise and educate their children in ideologically segregated enclaves. We permit parents to inculcate religious beliefs contrary to their children’s declared values, limits, order, even commands just as the more conventional use of the term does. But these values and demands come from within each person rather than being imposed from without. The idea that there are commands that one recognizes as one’s own, requirements that constrain one’s life, but come from the meaning or purpose of that life, captures the basic connection between law and freedom—which is perhaps the essence of the concept of autonomy. The necessary social dimension of the vision I am sketching comes from the insistence, first, that the capacity to find one’s own law can develop only in the context of relations with others (both intimate and more broadly social) that nurture this capacity, and second, that the “content” of one’s own law is comprehensible only with reference to shared social norms, values, and concepts.

(footnotes omitted); WILLIAM J. SHEARER, THE MANAGEMENT AND TRAINING OF CHILDREN 269 (1904) (“We must not forget that the great object of training is not merely to make children obedient. It is not to make them behave. It is not to keep them quiet. It is not to make them admired by others . . . . The great purpose of training is to make out of each what the Almighty evidently intended him to be. What He intended is not always an easy matter to determine. The only way it can be determined is by carefully studying the peculiarities of each mind, heart and body with which every child is gifted.”).

77. John H. Garvey, Children and the First Amendment, 57 Tex. L. Rev. 321, 346–49 (1979). Garvey identifies four ways in which free speech performs an instrumental role in the child’s growth toward autonomy: (1) “by permitting the individual to experience the satisfaction that results from self-expression,” (2) by “offering occasions for practice in skills of rational discourse,” (3) by “showing the young the potential of speech to accomplish good or bad results,” and (4) by “allowing receipt of information important for the child’s development.” Id.

preferences. Under the mantle of rights—parental rights, rights of religious freedom, or the especially potent combination of the two—we so circumscribe the child’s spiritual autonomy that, for many children, the freedom to choose or not to choose religious belief comes to exist more in principle than in fact.

In his “parentalist manifesto,” Stephen Gilles allows that the state has a duty to protect children from all forms of educational coercion.

The same goal—ensuring the liberty of individuals—requires the state to protect its citizens . . . . No one in a liberal society may coerce another’s choice of values or beliefs unless somehow privileged to do so. The baseline for defining coercive behavior (or sufficient justifications) may shift as one moves from state action to private conduct, but the core principle still holds: in a liberal society, all authority is limited, and all coercion requires reasoned justification.

It might be argued that parental religious mentoring is less likely to be injurious than state compulsion, but why should the baseline for defining coercive behavior shift as one moves from state action to private conduct? With equal force, it might be argued that coercion is likely to be more effective, and the injury it inflicts deeper, when the child is compelled to believe by those closest to him. Children are no less captive to private educators—all the more so when cut off from ideas contrary to those of home or community; and religious mentorship presents a specially effective form of force, bringing with it, as it does, the imprimatur of divine authority and the specter of divine disapproval.

79. See, e.g., Zummo v. Zummo, 574 A.2d 1130, 1149 (Pa. Super. Ct. 1990) (“Moreover, even if the children had expressed a personal religious identity it is not clear that the children would have had any constitutional right to resist, or to be protected from, attempts by either parent to exercise their constitutional rights to inculcate religious beliefs in them contrary to their declared preferences prior to their legal emancipation.”).

80. Cf. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 513 (1969) (“Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact.”).

The state that protects the freedom of adults to choose a religious (or non-religious) path must also ensure that the freedom of children to choose a religious (or non-religious) path will not be taken from them. The dictates of conscience are as compelling to the child (and future adult) as they are for the parent. Indeed, the commitment to individual choice may be the best guarantee of a society with rich and robust religious traditions. Children are natural religious seekers. As young adults, some will choose new spiritual paths, and some will choose to abandon religious ways altogether; but many will find their faith in traditional places, arriving where they started. For religious freedom to flourish, however, these choices must be genuine ones, based on knowledge and experience gathered, as it were, “out of a multitude of tongues,” religious and secular.  

In a liberal democracy, the binding power of moral commandments depends on individual acceptance.  

82. Keyishian v. Bd. of Regents, 385 U.S. 589, 683 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y 1943)); see also Associated Press, 52 F. Supp. at 372 (“[N]either exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”). But see Stanley Fish, Children and the First Amendment, 29 CONN. L. REV. 883, 884 (1997) (“[W]ithout ‘authoritative selection,’ education, whether public or private, would be impossible.”).  

83. See GALSTON, supra note 69, at 28 (maintaining that it is a matter of great importance for Jews “to live in a society that permits them to live in accordance with their understanding of an identity that is given rather than chosen, and that typically is structured by commandments whose binding power does not depend on individual acceptance”); cf. MICHAEL J. SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 66–67 (1996) (“For procedural liberalism . . . the case for religious liberty derives not from the moral importance of religion but from the need to protect individual autonomy; government should be neutral toward religion for the same reason it should be neutral toward competing conceptions of the good life generally—to respect people’s capacity to choose their own values and ends. But despite its liberating promise, or perhaps because of it, this broader mission depreciates the claims of those for whom religion is not an expression of autonomy but a matter of conviction unrelated to a choice. Protecting religion as a life-style, as
commitment to free choice means at least this: that the state has a compelling interest in providing all children the opportunity to make the most meaningful choices about the most meaningful matters.

IV. THE MORAL PERSONHOOD OF THE CHILD

For the Yoder majority, mandatory secondary schooling was objectionable because it would take Amish adolescents “away from their community, physically and emotionally, during the crucial and formative adolescent period of life.” In what sense, then, did the Court consider this period crucial and formative? It is during this period, the Court says, that the children “must acquire Amish attitudes favoring manual work and self-reliance and the specific skills needed to perform the adult role of an Amish farmer or housewife.” During this period, children “must learn to enjoy physical labor.” During this period, “the Amish child must also grow in his faith and his relationship to the Amish community if he is to be prepared to accept the heavy obligations imposed by adult baptism.” For the Amish child, the adolescent period is crucial and formative not in the sense that the child is forming his or her identity; rather, the child labors under a number of “musts,” all of which are crucial if the child is to conform successfully to communal religious traditions. The Yoder decision turns upside-down the nature of adolescence, ignoring what is really important about this stage of development—the increasing independence from adult

one among the values that an independent self may have, may miss the role that religion plays in the lives of those for whom the observance of religious duties is a constitutive end, essential to their good and indispensable to their identity.”). But cf., e.g., Wallace v. Jaffree, 472 U.S. 38, 52–53 (1985) (“[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual’s freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful . . . .”).

85. Id. (emphasis added).
86. Id. (emphasis added).
87. Id. (emphasis added).
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guidance; the defining of a self by reference to new ideas and by association with unlike peers; the preparation for intelligent participation in the democratic process; even the adolescent’s own quest for spiritual meaning—and consigns the young adult to a life of “idiosyncratic separateness.” (It was no mean feat of legal analysis for the Court to find that the “limitations” accompanying the Amish way of life are “self-imposed.”)

In general, the Supreme Court sees the liberty interests of the parent and child as “inextricably linked.” The child is not, however, without independent constitutional standing to challenge deprivations of educational opportunity. Though the Supreme Court has seen the need to act “with sensitivity and

88. Cf. Arneson & Shapiro, supra note 68, at 172 (“[T]he Amish defendants themselves seemed to have a lively appreciation of the fact that early adolescence is a crucial period for defining one’s identity and one’s relation to the values taught as authoritative in one’s childhood. If the development of children’s minds from ages fourteen to sixteen is not consequential, what is the fuss about?”).


90. The idea that the classroom is the seedbed of democratic virtues is one of our most enduring national themes. See generally, e.g., EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY (1997); LAWRENCE A. CREMIN, AMERICAN EDUCATION: THE COLONIAL EXPERIENCE 1607–1783 415–71 (1970); AMY GUTMANN, DEMOCRATIC EDUCATION (1987); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY (2000).


92. Yoder, 406 U.S. at 226.

93. Id. at 225.


flexibility to the special needs of parents and children,”96 it is undisputed that “whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”97 And with respect to many due process claims, the Court has concluded “that the child’s right is virtually coextensive with that of an adult.”98 Even against parents, the child is not beyond the protection of the Constitution. 99 Indeed, the due process protections from which the right to parent arises also work on behalf of the child’s independent educational interests. Thus, the Court has read Meyer v. Nebraska and Pierce v. Society of Sisters as protecting children against state efforts to enforce intellectual homogeneity.100 It is the child’s due process rights that, in part, explain why “state-operated schools may not be enclaves of totalitarianism.”101

Students in school as well as out of school are “persons” under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.102

The law of parent-child relations accepts as a starting point the longstanding legal presumptions (1) that “parents possess

96. Bellotti v. Baird, 443 U.S. 622, 634 (1979); cf. May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) (“Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children.”).
98. Bellotti, 443 U.S. at 634.
101. Id. at 511.
102. Id.
what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions,” and (2) that “natural bonds of affection lead parents to act in the best interests of their children.”\textsuperscript{103} The Court has had numerous opportunities to test the currency of these legal presumptions. In \textit{Parham v. J.R}, the Court considered the constitutionality of mental health laws permitting parents to admit children to hospitals for treatment.\textsuperscript{104} On behalf of the children, it was argued that

\begin{quote}
the constitutional rights of the child are of such magnitude and the likelihood of parental abuse is so great that the parents’ traditional interests in and responsibility for the upbringing of their child must be subordinated at least to the extent of providing a formal adversary hearing prior to a voluntary commitment.\textsuperscript{105}
\end{quote}

But the Court thought that this argument swept too broadly.

Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments . . . . We cannot assume that the result in \textit{Meyer v. Nebraska} and \textit{Pierce v. Society of Sisters} would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents’ authority to decide what is best for the child.\textsuperscript{106}

The Court rejected the “statist notion that governmental

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\textsuperscript{103} \textit{Parham v. J.R.}, 442 U.S. 584, 609 (1979). \\
\textsuperscript{104} \textit{Id.} at 584. \\
\textsuperscript{105} \textit{Id.} at 602. \\
\textsuperscript{106} \textit{Id.} at 603–04 (citations omitted).
\end{flushleft}
power should supersede parental authority in all cases because some parents abuse and neglect children . . . ”

Absent evidence that rebuts the traditional presumptions in favor of parental control, parents retain “a substantial, if not the dominant, role in the [commitment] decision.” Still, the Court did not walk away from the interests of children, adding that “the child’s rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized.”

The Court walked a careful line between the interests of child and parent, and it noted that “experience and reality may rebut what the law accepts as a starting point . . .”

Sometimes, experience and reality do rebut legal presumptions. The liberty interests of children and parents are not always compatible; there will be points of collision where the protection of children’s needs and rights has to come at the cost of parental authority. This is often the case, for instance, in the area of medical decision making. The law generally pays homage to the medical choices that parents make for their children, but in some circumstances minors can get care without their parents’ consent, and, in fact, without their parents’ knowledge.

In many states, unemancipated minors are allowed by law to consent to treatment for substance abuse, for venereal disease (including testing for HIV and sexually transmitted diseases), and counseling for mental health problems, sexual abuse, and family planning. Minors can get birth control, including prescription contraceptives, without parental consent or notification; a pregnant minor may consent to prenatal care as well as labor and delivery services. Information about these medical services remains confidential.

And where statutory

107. Id. at 603.
108. Id. at 604.
109. Id.
110. Id. at 602.
112. Id.
113. Id. at 418–19.
114. Id.; see also Parents United for Better Schs., Inc. v. Sch. Dist. of Phila.
protection is lacking, the mature minor doctrine may operate to shield the child’s medical decision-making rights from the religious beliefs of his or her parents.\textsuperscript{115}

It is true that there are practical concerns at work here. The worry is that parents will object to these services, thus discouraging adolescents from seeking treatment important to their health and to the welfare of society as a whole. So, to protect these interests, legislators have provided minors with what amounts to a parental bypass option.\textsuperscript{116} But to cast these decisions as medical, not ethical—itself a value-laden judgment—too easily dismisses the moral and religious concerns of parents. The truth is that the state has wrested control from parents over some of a young person’s most intimate and morally problematic personal decisions.

In fact, the Supreme Court has applied a mature minor doctrine to the most value-laden of medical decisions. The legal struggle to guarantee a woman’s right to terminate a pregnancy has put the Court squarely in the business of defining the allocation of moral authority between parent and child. In \textit{Planned Parenthood of Central Missouri v. Danforth}, the Court held (among other things) that the state could not justify legislation that required a minor to obtain the consent of a parent as a condition for abortion during the first trimester.\textsuperscript{117} The Court made the customary nod toward \textit{Meyer}, \textit{Pierce}, and \textit{Yoder}, but finally rejected chronological age as a constitutional yardstick by which to measure whether a minor can independently make the abortion decision: “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.”\textsuperscript{118}

\textsuperscript{115} On the evolution of the mature minor doctrine, see, for example, Lawrence Schlam & Joseph P. Wood, \textit{Informed Consent to the Medical Treatment of Minors: Law and Practice}, 10 \textit{Health Matrix} 141, 144–52 (2000).

\textsuperscript{116} \textit{Id.}; see also Hartman, \textit{supra} note 111, at 416–22.

\textsuperscript{117} 428 U.S. 52 (1976).

\textsuperscript{118} \textit{Id.} at 74.
On this doctrinal platform, the Court held that “the safeguarding of the family and of parental authority” was not a state interest sufficiently significant to justify conditioning the minor’s access to abortion on parental consent.\textsuperscript{119} In \textit{Bellotti v. Baird}, the Court struck down a law that required a minor seeking an abortion to either (1) obtain the consent of her parents, or (2) notify them of any proceedings by which the minor sought to obtain judicial consent for an abortion.\textsuperscript{120} The \textit{Bellotti} Court did its best not to challenge the core presumptions governing the relations of parent and child. Typically, the Court made the point that there were several good reasons why the state may reasonably limit a minor’s freedom to make independently “important, affirmative choices with potentially serious consequences.”\textsuperscript{121} In the context of abortion, however, none of these reasons was reason enough to require parental notification. The Court based its decision on the unique nature of the abortion decision.\textsuperscript{122} Unlike countless other decisions (like the decision to marry, for example), the abortion decision cannot be postponed; unlike few other situations, the consequences of denying a minor the right to make this decision would be “grave and indelible.”\textsuperscript{123} Given what the Court described as the “profound moral and religious concerns” associated with the abortion decision,\textsuperscript{124} it would be unrealistic to think that some parents would not make (all too emphatically) clear their objection to the minor’s decision.

\textsuperscript{119} \textit{Id.} at 75; \textit{cf.} \textit{Carey v. Population Servs. Int’l}, 431 U.S. 678, 719 (1977) (declaring that a state may not use police power to enforce its concept of public morality as it pertains to minors).
\textsuperscript{120} 443 U.S. 622, 625 (1979).
\textsuperscript{121} \textit{Id.} at 635.
\textsuperscript{122} \textit{Id.} at 642–44.
\textsuperscript{123} \textit{Id.} at 642.
\textsuperscript{124} \textit{Id.} at 640.
avenue of relief for some of those who need it the most.  

In this context, the Court seems to have accepted the “statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children . . . ”.  

The presumption that parents act in the best interests of their children has been reversed. Or, perhaps, the presumption is meaningless when there is no way to agree about where the child’s best interests lie. The unique nature of the abortion decision cuts both ways. The child may focus on the fact that the decision cannot be postponed; the parent may focus on the fact that the decision cannot be undone. That the consequences of the decision are grave and indelible would strike many as more reason for parents to be involved. Regardless of one’s position on abortion, it is difficult not to conclude that the Supreme Court’s abortion jurisprudence has changed the landscape of parent-child relations. If minors can make a decision as profound as whether to terminate a pregnancy, why should courts presume that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s other difficult decisions?

In its position on the reproductive rights of minors, the Court is clearly attentive to the limits of parental authority, but there is also at work a deeper concern about the personhood of the prospective mother. The abortion cases rest in part on the fundamental “moral fact that a person belongs to himself and not to others nor to society as a whole.”  

Of course, other “facts” of human nature work against atomistic theories of personhood and social relations, but surely Kenneth L. Karst is correct enough when he asserts that “freedom of associational choice enhances the values of intimate association to a degree that would not be attainable if choice were absent.”  

As children mature, they

125. Id. at 647.
enter into a host of intimate associations, the value of which very much depends on the child’s freedom of choice. We might even say that the child will have to choose whether or not to identify with his or her parents and “to be committed to maintaining a caring intimacy with them.”\textsuperscript{129} But the decision to choose one’s parents, so to speak, is meaningful only if it is a free one, only, that is, if the maturing child enjoys the freedom to choose not to make that association (or, at least, not to make it an intimate one). As Karst writes, the full value of commitment can be measured “only when there is freedom to remain uncommitted . . . . [C]oerced intimate associations are the most repugnant of all forms of compulsory association.”\textsuperscript{130} This is not just the case with intimate associations, however; it is (again, Karst) “equally applicable to associations that are primarily ideological.”\textsuperscript{131} It hardly needs to be added that coerced religious association is repugnant in ways both intimate and ideological.

Frieda Yoder was fifteen years old when she testified that religious beliefs guided her decision to discontinue school attendance.\textsuperscript{132} Lillian Gobitis was not yet a teenager when the court heard her objection to compulsory patriotic rituals.\textsuperscript{133} And Betty Simmons was only nine years old when she testified that street preaching was a religious duty.\textsuperscript{134} The courts should be no less reluctant to hear from children when they choose not to

\textsuperscript{129} Id. at 644.
\textsuperscript{130} Id. at 637–38.
\textsuperscript{131} Id. at 638; see also Alan B. Kalin, Comment, The Right of Ideological Nonassociation, 66 CALIF. L. REV. 767 (1978). And, we might add, freedom of choice is equally applicable to associations that are primarily vocational. See Wisconsin v. Yoder, 406 U.S. 205, 239–40 (1972) (White, J., concurring) (“It is possible that most Amish children will wish to continue living the rural life of their parents, in which case their training at home will adequately equip them for their future role. Others, however, may wish to become nuclear physicists, ballet dancers, computer programmers, or historians, and for these occupations, formal training will be necessary.”); see also id. at 244–45 (Douglas, J., dissenting) (“While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer.”).
\textsuperscript{132} Yoder, 406 U.S. at 207 n.1.
\textsuperscript{133} Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591(1940).
\textsuperscript{134} Prince v. Massachusetts, 321 U.S. 158, 159 (1944).
follow the religious preferences of their parents, when there are, as Justice Douglas put it, “potentially conflicting desires.”

When parent and child agree, it will not always be easy to determine if the child is speaking freely. When parent and child disagree, it will not always be easy to determine whether the child is sufficiently mature to make decisions about religious identity. But these are matters with which courts are familiar enough. The reality is that children can be coerced by not being heard as surely as they can by being forced to utter what is not in their minds. If the child belongs to herself, she may not be made a means by which parents perpetuate their own moral mandates or preferences; she may not be held hostage to religious tradition.

Before the full moral personhood of the child, the

135. Id. (Douglas, J., dissenting) (“Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child’s rights to permit such an imposition without canvassing his views.”).

136. For instance:

The slave-master may withhold education and the Bible; he may forbid religious instruction, and access to public worship. He may enforce upon the slave and his family a religious worship and a religious teaching which he disapproves. In all this, as completely as in secular matters, he is “entirely subject to the will of the master, to whom he belongs.” The claim of chattelhood extends to the soul as well as to the body, for the body cannot be otherwise held and controlled . . . . There is no other religious despotism on the face of the earth so absolute, so irresponsible, so soul-crushing as this.

WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURES SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 235 (1853) (emphasis added). Compare the above regulation with, for example, Stephen L. Carter, Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later, 27 SETON HALL L. REV. 1194, 1200–05 (1997) (“A religion, then, is not a static thing, existing at a particular place and time. It is, or rather, it aspires to be at once elusive and evolutionary, existing in more than one time. A religion, in this view, is a story that a people (not a person) tells itself about its historical relationship to God. One reason our contemporary constitutional law tends to miss this point is that it tends to view religion as a matter of individual choice rather than as a community activity; but serious religions revolve around the group, not the individual . . . . A religion survives through tradition, and tradition is multigenerational. A religion that fails to extend itself over time is, in this vision, not a religion at all. It might be a set of moral beliefs or a collection of folk tales or a nifty theological idea or a list of interesting rules, but, if it does not exist in this timeless,
right to parent, even when joined to a claim of religious liberty, must give way.

William Galston, among others, describes parenting as a form of expressive liberty.137 By expressive liberty, he means “the absence of constraints imposed by some individuals or groups on others that make it impossible or significantly more difficult for the affected individuals or groups to live their lives in ways that express their deepest beliefs about what gives meaning and value to life.”138 Galston adds that “[n]ot all sets of practices

evolutionary fashion, the one thing it is not is a religion.”); George W. Dent, Jr., Of God and Caesar: The Free Exercise Rights of Public School Students, 43 CASE W. RES. L. REV. 707, 738 (1993) (“The communitarian tradition is especially relevant to the religion clauses because the survival of religious communities is necessary to make the religious freedom of individuals ‘both possible and meaningful.’ The education of children is crucial to this survival. People are mortal, but humanity (we hope) is not. To survive, religious groups depend on raising their members’ children within the faith. Although government may not act affirmatively to preserve any particular religious group or religion generally, religious freedom permits, and to some extent requires, government to forbear from unnecessarily weakening religious communities. When public schools undermine a sect without a compelling need to do so, the state should offer reasonable accommodation to children of the sect.”).

137. GALSTON, supra note 69, at 101–02, 109 (“[T]he ability of parents to raise their children in a manner consistent with their deepest commitments is an essential element of expressive liberty.”); see also DAVID WILLIAM ARCHARD, CHILDREN, FAMILY AND THE STATE 96 (2003) (“Being a parent is extremely important to a person. Even if a child is not to be thought of as the property or even as an extension of the parent, the shared life of a parent and child involves an adult’s purposes and aims at the deepest level . . . . [P]arents have an interest in parenting—that is, in sharing a life with, and directing the development of, their child. It is not enough to discount the interests of a parent in a moral theory of parenthood. What must also merit full and proper consideration is the interest of someone in being a parent.”); Colin M. MacLeod, Conceptions of Parental Autonomy, 25 POLITICS AND SOCIETY 117, 119 (1997) (“[T] hose who accept the responsibility of raising children frequently do so because the project of creating and raising a family is an important, indeed often fundamental, element of their own life plans. Viewed from this perspective, parents cannot be seen as mere guardians of their children’s interests. They are also people for whom creating a family is a project from which they may derive substantial value. They have an interest in the family as a vehicle through which some of their own distinctive commitments and convictions can be realized and perpetuated.”); Arneson & Shapiro, supra note 68, at 151 (“As the discharge of parental obligations allows wide scope for parental discretion, choosing and pursuing a child-rearing regimen is for many parents an important mode of self-expression and personal creativity.”).

138. GALSTON, supra note 69, at 101.
will themselves rest on, or reflect a preference for, liberty as ordinarily understood . . . Expressive liberty protects the ability of individuals and groups to live in ways that others would regard as unfree.” 139 For Galston, then, the expressive interests of parents “are not reducible to their fiduciary duty to promote their children’s interests.” 140 But does the expressive liberty of parents include the right to force children to live in unfree ways? 141 Here, Galston agrees with Eamonn Callan’s critique of parenting that leads children to a life of ethical servility. “As a parent,” Galston writes (quoting Callan), “I cannot rightly mold my child’s character in a way that effectively preempts ‘serious thought at any future date about the alternatives to my judgment.’” 142 The child, too, has an interest in expressive liberty,

139. Id. at 29.
140. Id. at 103; cf. Callan, supra note 90, at 144–45 (“We do not experience the rearing of a child merely as unilateral service on behalf of a separate human life; we experience it as the sharing of a life and a cardinal source of self-fulfillment. The child-centered strategy, when it purports to be the whole moral truth about parenthood, flies in the face of our ordinary understanding of what rearing a child signifies because it does not accommodate the task’s momentous expressive significance in parents’ lives. By the ‘expressive significance’ of child-rearing I mean the way in which raising a child engages our deepest values and yearnings so that we are tempted to think of the child’s life as a virtual extension of our own . . . . No one would now deny that if a moral theory interprets the child’s role so as to make individual children no more than instruments of their parents’ good it would be open to damning moral objections. But parallel objections must be decisive against any theory that interprets the parent’s role in ways that make individual parents no more than instruments of their children’s good.” (citations omitted)).

141. See William Galston, Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State 253 (1991) (objecting to the conclusion that “the state must (or may) structure public education to foster skeptical reflection on ways of life inherited from parents or local communities”). But see Anne C. Dailey, Developing Citizens, 91 IOWA L. REV. 431, 484 (2006) (“A developmental approach [to caregiving] does rule out the possibility that a commitment to democratic citizenship is compatible with depriving children of the means by which to choose whether to accept or reject family beliefs or practices. The unexamined life—a life premised on faith rather than reason—is a perfectly acceptable choice for adult citizens, but foreclosing children from eventually making that choice for themselves is not compatible with democratic principles or the maintenance of a democratic constitutional polity. A developmental perspective sets some outer limits on the extent to which communities of faith may sustain themselves by depriving children of the opportunity for acquiring the skills of democratic citizenship.” (footnote omitted)).

142. Galston, supra note 69, at 105 (quoting Creating Citizens: Political
though a prospective one, “that parents cannot undermine.”  

No doubt, the expressive interests of parents can be pushed too far. The question is: How far is too far? No doubt, children, dependent as they are, rely on parental direction to establish a sense of self and place in the world. But a healthy respect for the proper boundaries of parental authority does not mean that children ought to be used as the vehicle of adult religious expression.  

We would all agree (wouldn’t we?) that the expressive interests of parents would not legitimate the ritual sacrifice of children. Galston appears to require parents to hurdle a much higher bar when he proposes that “parents abuse their expressive liberty if . . . they deprive their children of the opportunity to exercise their own expressive liberty.” But it turns out that the bar is not very high: Galston means that parents abuse their expressive liberty “if they turn their children into automatons.” It would be abusive to seal off the outside world “so that children are not even aware of alternatives to the group’s way of life.” Thus, for Galston, Yoder is a correct decision. It protects the expressive liberty of Amish parents without depriving Amish children of the opportunity to exercise their own expressive liberty. After all, he observes, “the Amish community is not a prison.”

143. Id.

144. Cf. Martha L. A. Fineman, Taking Children’s Rights Seriously, in CHILD, FAMILY, AND STATE 240 (Stephen Macedo & Iris Marion Young eds., 2003) (“The big question is not whether the state must recognize parents’ expressive interest in their children’s interest, but where we draw the line separating that expressive interest from the child’s interest in the diversity and independence-conferring potential of a secular and public education.”); Arneson & Shapiro, supra note 68, at 154 (stating that parents “cannot pretend to speak for the child while really regarding the child as an empty vessel for the parents’ own religious convictions”).

145. See GALSTON, supra note 69, at 102 (“No one would seriously argue that the expressive liberty of parents would legitimate the ritual sacrifice of their children . . . .”).

146. See id. at 105.

147. Id.

148. Id.

149. Id. at 106. But see Arneson & Shapiro, supra note 68, at 140–41 (“Although the Amish believe that the vow of baptism must be taken voluntarily
Of course, Galston knows that parents can undermine the expressive liberty of children without turning them into automatons. The narcissistic parent can create a regime of filial obedience so rigid that children cannot fairly consider the alternatives of which they are aware. Galston writes that “[t]he nonexercise of a justified claim becomes questionable only when the potential claimant is subject to intimidation or is deprived of the information and self-confidence required for independent judgment.” But is not rejection by home and community always a form of intimidation? Is not schooling beyond the eighth grade a prerequisite for the information and self-confidence required for independent judgment? Galston notes that “[s]ubstantial numbers” of Amish children decide to leave their religious community. But he fails to note that those who do decide to leave face the prospect of being shunned—that is, they exercise a justified claim of religious liberty (their freestanding exit right) only at the cost of forsaking the only life they know, at the cost of being abandoned by home and community. We ought to remind ourselves that the ritual sacrifice of children can take a variety of forms.

by a mature person, they go to great lengths in designing their system of education and acculturation to ensure that Amish children will take the vow and join the church.”).  

150. GALSTON, supra note 69, at 105.  

151. Id. at 106. According to Donald Kraybill’s study of Amish culture, the Amish “retention rate” is about eighty-six percent. See Donald B. Kraybill, Plotting Social Change Across Four Affiliations, in THE AMISH STRUGGLE WITH MODERNITY 73 (Donald B. Kraybill & Marc A. Olshan eds., 1994); cf. MacLeod, supra note 137, at 136 (“[A]lthough entrance into the Amish culture by an adolescent is officially a matter of voluntary choice, it is difficult to see such a choice as the expression of genuine autonomy. After all, the ordinary Amish adolescent can hardly be said to have an informed opinion about other possible life choices and for most of her life has, in effect, been subjected to the will of her parents and community.”). Oddly, Yoder was based on the premise that secondary schooling was not needed because the children were being prepared “for life in the separated agrarian community that is the keystone of the Amish faith.” Wisconsin v. Yoder, 406 U.S. 205, 222 (1972).
V. EDUCATION FOR AN OPEN RELIGIOUS FUTURE

Few disputes generate the degree of heat or the depth of hostility that accompany religious controversy. When that controversy touches the lives of our children, it is often a struggle to find room for compromise; it takes nothing less than a leap of faith to see compromise as anything less than a violation of one’s conscience. The religious destiny of our children matters so deeply, so personally—it matters so much—that we fight with... well, with religious fervor. In our homes, schools, and communities, and, of course, in our courts, we fight to control our children’s religious upbringing as though we are (and many truly believe they are) fighting for the soul of the child. Sadly, if predictably, it is children who suffer the fallout of uncompromising religious conviction.

Children are poorly served by a legal regime that too readily defers to the talismanic invocation of religious parenting rights. In this regard, courts should look skeptically at any educational program, whether imposed by the parent or by the state, that restricts the spectrum of knowledge available to the child. To see that free choice is not strangled at its source, the state may not sponsor particular religious beliefs, but that is not enough; it must protect its children from being forced to adopt religious beliefs; and this obligation, as educational theorist Harry Brighouse has pointed out, “cuts against the differential regulation of public and private schools with respect to religious instruction.” The state must protect all its children, not just


154. Harry Brighouse, School Vouchers, Separation of Church and State,
those in the public school system.155

It is the state’s duty to ensure that all schools, public and private, inculcate habits of critical reasoning and reflection, a way of thinking that implies a tolerance of and respect for other points of views.156 To pursue this goal, the state need not make public schooling compulsory.157 (Unless Pierce is overruled, it could not.) But it must see that all children are provided an education that is, in the fullest sense, public—a schooling that gives children the tools they will need to think for themselves by making public, as it were, a common intellectual and cultural capital; a schooling that takes seriously the idea that both autonomy and tolerance require children to know other sources of meaning and value than those they bring from home. This effort may well divide child from parent. Indeed, we should be entirely forthright and unapologetic about this: The inculcation of such habits is more likely than not to divide child from parent, not because socialist educators want to “submerge” our children.158

and Personal Autonomy, in Moral and Political Education 247 (Stephen Macedo & Yael Tamir eds., 2002).

155. Pierce v. Soc’y of Sisters, 268 U.S. 510, 534 (1925); cf. Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 245–46 (1968) (“Since Pierce, a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State’s interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes.”); Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947) (“This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose.”).

156. See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (“These fundamental values of ‘habits and manners of civility’ essential to a democratic society must, of course, include tolerance of divergent political and religious views . . . .”); Ambach v. Norwick, 441 U.S. 68, 77 (1979) (“These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.”).

157. But see Fineman, supra note 144, at 241 (“Perhaps the most appropriate suggestion for our current educational dilemma is that public education should be mandatory and universal.”)

158. Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (“In order to submerge the
but because learning to think for oneself is what children do; it is one facet of the overall movement toward separation and individuation that is “growing up,” perhaps the most natural and vital part of healthy maturation. Likewise, we should be entirely candid about the fact that the inculcation of such intellectual habits will be more compatible with the beliefs of some religious groups than others.\textsuperscript{159}

The state as educator, then, is no ideologically neutral actor.\textsuperscript{160} The philosophical foundations supporting a truly public education are the liberal biases of our nation’s intellectual forbearers, biases in favor of a non-authoritarian approach to truth, of free argument and debate—what Thomas Jefferson called truth’s “natural weapons”—and of a healthy sense of human fallibility.\textsuperscript{161} Unless children are to live under “a perpetual childhood of prescription,” they must be exposed to the

\begin{quote}

individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.”).

\textsuperscript{159}. Cf. Stephen Macedo, The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality, 69 Fordham L. Rev. 1573, 1593 (2001) (“The patterns of social life that support liberal democratic forms of civil flourishing embody definite rankings of competing human goods, which will be associated with some versions of religious truth and not others. In this sense, the project of promoting a healthy liberal democratic civil society is inevitably a deeply judgmental and non-neutral project.”).

\textsuperscript{160}. See, e.g., Stanley Ingber, Comment, Religious Children and the Inevitable Compulsion of Public Schools, 43 Case W. Res. L. Rev. 773, 778–79 (1993) (“A value-free curriculum is clearly impossible . . . . [S]chools simply cannot attain value-neutral or balanced education. With only limited resources and time, they cannot possibly provide curricula that encompass the world’s enormous mass of information and perspectives. Furthermore, subtle characteristics such as style and emphasis may undermine any substantive success in achieving balanced presentations. Even if these practical difficulties could be overcome, an insurmountable conceptual problem remains: Value neutrality itself has a value bias favoring the liberal philosophy embodied by the scientific method of inquiry.” (footnote omitted)); cf. Arons & Lawrence III, supra note 29, at 309 (“Schooling is . . . a manipulator of consciousness, an inculcator of values in young minds.”).

\textsuperscript{161}. Jefferson, supra note 30, at xvii.

\end{quote}
dust and heat of the race—intellectually, morally, spiritually. 162 Whether one considers the formation of moral commitments a matter of choice or duty, of self-directedness or cultural embeddedness, the child must not be denied the type of education that will allow him, as an adult, to choose whether or not (and in what way, and to what degree) to honor those commitments. A public education is the engine by which children find a place (or places) on “the great sphere” that is their world and legacy.163 It is their means of escape from, or free commitment to, the social group in which they were born. It is their best guarantee of an open future.

In Meyer and Pierce the Court feared that the state as educator would “standardize its children.”164 But children sent to

162. JOHN MILTON, AREOPAGITICA, in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 727–28 (Merritt Y. Hughes ed., 1957) (1644) (“For those actions which enter into a man, rather than issue out of him, and therefore defile not, God uses not to captivate under a perpetual childhood of prescription, but trusts him with the gift of reason to be his own chooser; there were but little work left for preaching, if law and compulsion should grow so fast upon those things which heretofore were governed only by exhortation . . . . I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race where that immortal garland is to be run for, not without dust and heat.”).

163. See BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 159 (1980) (“The entire educational system will, if you like, resemble a great sphere. Children land upon the sphere at different points, depending on their primary culture; the task is to help them explore the globe in a way that permits them to glimpse the deeper meanings of the life dramas passing on around them. At the end of the journey, however, the now mature citizen has every right to locate himself at the very point from which he began—just as he may also strike out to discover an unoccupied portion of the sphere.”).

164. Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.”). On the threat of state indoctrination in the public schools, see, for example, Dent, Jr., supra note 136, at 707; Strossen, supra note 72; Arons & Lawrence III, supra note 29; Robert D. Kamenshine, The First Amendment’s Implied Political Establishment Clause, 67 CALIF. L. REV. 1104 (1979); Mark G. Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 TEX. L. REV. 863 (1979); Joel S. Moskowitz, The Making of the Moral Child: Legal Implications of Values Education, 6 PEPP. L. REV. 105 (1979); cf. JOHN STUART MILL, ON LIBERTY AND OTHER ESSAYS 117–18 (Oxford Univ. Press 1991) (1859) (“A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the
religiously or ethnically homogeneous private schools, or those kept cloistered at home, might more easily suffer a similar fate. We are well cautioned by family law historian Barbara Bennett Woodhouse that “[s]tamped on the reverse side of the coinage of family privacy and parental rights are the child’s voicelessness, objectification, and isolation from the community.”

The open world of public schooling should challenge the transmission of any closed set of values, whether those values belong to parent or state. If education is to foster, in Eamonn Callan’s words, “[t]he cultivation of serious and independent ethical criticism, and the enlargement of the imagination that process entails,” it must not only question parental authority but provide as well a brake on efforts at state indoctrination. Ideally, the state, like the ideal parent, would want to cultivate the child’s capacity to make free choices. But, like real parents, the state can behave less than liberally toward its young people. The liberal state wants to pass on its traditions of freedom and equality, but the surest way not to do so would be to pass on those traditions as moral absolutes to be accepted uncritically. To guard against predominant power . . . whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation in proportion as it is efficient and successful, it establishes a despotism over the mind.”


Cf. Suzanna Sherry, Responsible Republicanism: Educating for Citizenship, 62 U. CHI. L. REV. 131, 188–89 (1995) (“[A] citizen needs to be able both to understand and internalize the norms of her society and to judge those norms against rational attack. A predisposition to adopt certain values, coupled with the knowledge and critical skills necessary for citizenship, is likely to yield slow but careful changes that jeopardize neither the stability of the polity nor the liberty of its citizens.”); Ingber, supra note 160, at 19 (“Society must indoctrinate children so they may be capable of autonomy. They must be socialized to the norms of society while remaining free to modify or even abandon those norms.”).

Of course, the state as educator may have interests other than the child’s intellectual welfare. On the mixed motives undergirding historical efforts to regulate public schooling, see generally SAMUEL BOYLES & HERBERT GINTIS, SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORM AND THE CONTRADICTION OF ECONOMIC LIFE (1976); CARL F. KAESTLE, PILLARS OF THE
indoctrination at home or at school (or elsewhere, for that matter), the liberal state must provide a common education that prepares its children to make choices that are as free and independent as possible.

The state as educator does not replace the parent as educator. The parent remains a private source of intellectual and moral authority (as do a host of private players and entities). Indeed, against these private sources, “the state is normally at a disadvantage.” Thus, even if the state were to mandate a common curriculum for all schools, public and private, the allocation of educational authority still would be shared by parent and state. Ira Lupu usefully approaches the issue of educational pluralism by thinking in terms of separated powers, comparing the division of power and influence over the educational liberty of children to the Constitution’s structural division of governmental power. This model of power

169. See Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940) (“What the school authorities are really asserting is the right to awaken in the child’s mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent’s authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state’s educational system is seeking to promote.”), overruled by W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); cf. Gutmann, supra note 90, at 69 (“[P]arents command a domain other than schools in which they can—and should—seek to educate their children, to develop their moral character and teach them religious or secular standards and skills that they value . . . . The discretionary domain for education—particularly but not only for moral education—within the family has always been and must continue to be vast within a democratic society. And the existence of this domain of parental discretion provides a partial defense against those who claim that public schooling is a form of democratic tyranny over the mind.”).

170. See generally Lupu, supra note 74. See also Parker v. Hurley, 514 F.3d 87, 105–06 (1st Cir. 2008) (“[T]he mere fact that a child is exposed on occasion
separation, as Lupu writes, “reduces the risk of tyrannical treatment and domination of children” by parents as well as the state.\(^{171}\)

But parentalism is not about educational power sharing. It is about control. Parentalists who paint the public education system as ideologically monolithic and propose greater educational choice rarely purport to be the guardians of the child’s educational options.\(^{172}\) What the parentalist seeks to
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protect is the parent’s choice “to reject schooling that promotes values contrary to their own.”\textsuperscript{173} We can be certain that some parents will choose educational options precisely because they want monopolistic control over the ideas to which their children have access. For some religious parents, no compromise is possible with the public school curriculum; no state regulation is acceptable;\textsuperscript{174} and the only educational option is the ideological and social segregation of private schooling.\textsuperscript{175} Even proponents of

requirement and the students’ relative impressionability, the school’s structure makes students especially vulnerable to the influence of teachers and other school authorities, who wield significant power over them.”); Arons & Lawrence III, supra note 29, at 317 (comparing public school to other “total institutions”); cf. Yudof, supra note 164, at 902 (describing school as a “semitotal” institution).

173. Gilles, supra note 81, at 938. This reality can be masked by referring to parental choice as “family choice.” See also, e.g., Arons & Lawrence III, supra note 29, at 325 (“The government allows families to inculcate their own values by choosing private schools.”).

174. See, e.g., New Life Baptist Church Acad. v. Town of East Longmeadow, 666 F. Supp. 293, 297 (D. Mass. 1987) (“Plaintiffs believe that parents are required by their religion to educate their children to share their faith. They also believe that they are obligated by God to provide as an indispensable ministry of their church a school which teaches their religious beliefs. For plaintiffs, the secular and religious aspects of education are inseparable. Thus, in its educational ministry, New Life teaches all subjects from a biblical and Christian view of the world. Plaintiffs believe they are forbidden to send their children to schools, such as public schools, which they believe teach doctrines contrary to the Holy Scriptures.”).

175. See MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 58 (1999) (arguing that “it is difficult for children to achieve autonomy solely within the bounds of their families and home communities—or even within the bounds of schools whose norms are constituted by those held by the child’s home community”); cf. Rob Reich, Testing the Boundaries of Parental Authority over Education, in MORAL AND POLITICAL EDUCATION 299 (Stephen Macedo & Yael Tamir eds., 2002) (“I submit that even in a minimal construal of autonomy, it must be the function of the school setting to expose children to and engage children with values and beliefs other than those of their parents. To achieve minimal autonomy requires that a child know that there are ways of life other than that into which he or she has been born. Minimal autonomy requires, especially for its civic importance, that a child be able to examine his or her own political values and beliefs, and those of others, with a critical eye. It requires that the child be able to think independently. If this is all true, then at a bare minimum, the structure of schooling cannot simply replicate in every particularity the values and beliefs of a child’s home.”). The social segregation of private schooling can be its own form of intellectual incapacitation. The child misses the associational incitements, good and bad, that accompany a diverse peer group. See, e.g., Buss, supra note 89, at 1233 (suggesting that public
education might be required in order to facilitate adolescent associational activity with unlike peers); cf. In re Kurowski, 20 A.3d 306, 319 (N.H. 2011) (noting that in custody decision trial court was "guided by the premise that education is by its nature an exploration and examination of new things, and by the premise that a child requires academic, social, cultural, and physical interaction with a variety of experiences, people, concepts, and surroundings in order to grow to an adult who can make intelligent decisions about how to achieve a productive and satisfying life"). But cf. Eugene Volokh, Preference for Public School over Homeschooling—and Maybe Private Schooling—Partly Because It Provides “Exposure to Different Points of View”, THE VOLOKH CONSPIRACY (Mar. 17, 2011), http://volokh.com/2011/03/17/preference-for-public-school-over-homeschooling-and-maybe-private-schooling-partly-because-it-provides-exposure-to-different-points-of-view/#contact ("It may well be in [a] child's best interests to be exposed to more views in public school—or it may well be in the child’s best interests to avoid the views that public school will expose her to. Those are not judgments that courts should generally make given the First Amendment."). And the child will never meet that teacher who, just by being a non-parental role model, opens the eyes of children to new and unimagined vistas. Cf. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (“Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.”); Ambach v. Norwich, 441 U.S. 68, 78–79 (1978) (“Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students... Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.”). Before the boom era of the modern home-schooling movement, social segregation was a concern that courts took seriously, routinely upholding state educational regimes that did not permit home instruction. See, e.g., State v. Edgington, 663 P.2d 374, 378 (N.M. Ct. App. 1983) (“By bringing children into contact with some person, other than those in the excluded group, those children are exposed to at least one other set of attitudes, values, morals, lifestyles and intellectual abilities.”); State v. Riddle, 285 S.E.2d 359, 366 (W. Va. 1981). The defendants in Riddle were “Biblical Christians” who, according to the court, “[were] determined to have their children totally indoctrinated and educated in their religious beliefs, with no smattering of heresy.” Riddle, 285 S.E.2d at 361. The parents “never requested the county superintendent of schools to approve their home as a place for instruction,” as required by law. Id. at 363. With less than abundant generosity of spirit, the court thought it was
public school choice may show little interest in schooling that is ideologically pluralistic. The charter school movement may hold the promise of a common education without the curricular rigidity of a common schooling, and more attention should be paid to the role that charter schools, including religious charter schools, might play in a public school system; but charter inconceivable that in the twentieth century the free exercise clause of the first amendment implies that children can lawfully be sequestered on a rural homestead during all of their formative years to be released upon the world only after their opportunities to acquire basic skills have been foreclosed and their capacity to cope with modern society has been so undermined as to prohibit useful, happy or productive lives.

*Id.* at 366; cf. *State v. Hoyt*, 146 A. 170, 170–71 (N.H. 1929) (“Education in public schools is considered by many to furnish desirable and even essential training for citizenship, apart from that gained by the study of books. The association with those of all classes of society, at an early age and upon a common level, is not unreasonably urged as a preparation for discharging the duties of a citizen.”); *Knox v. O'Brien*, 72 A.2d 389, 392 (Cape May County Ct. 1950) (“Cloister and shelter have its place, but not in the every day give and take of life . . . . The entire lack of free association with other children being denied to [the O'Brien children], by design or otherwise, which is afforded them at public school, leads me to the conclusion that they are not receiving education equivalent to that provided in the public schools in the third and fifth grades.”).


177. A common state-mandated curriculum could ensure that all charter schools, including religious ones, do not become segregated educational enclaves. Charter schools that satisfy common curricular requirements would be able to add focused educational offerings compatible with religious values and culture. (In addition, they would be able to make reasonable accommodations logistically impossible for the public schools.) Additions to a common curriculum are consistent with the core principle of *Meyer* and *Pierce* that a parent has a right, “after he has complied with all proper requirements by the state as to education, to give his child such further education in proper
schools ought to be more than a state-supported means of forming an ideologically bounded community “within which like-minded parents and teachers can reside.”\textsuperscript{178} (And, it goes without saying, students who will be expected to be equally like-minded.) One advocate of educational choice observes approvingly that a charter school would provide parents “with the opportunity to create a free public school that, while it does not teach their religious beliefs, also does not teach lessons that they find religiously objectionable.”\textsuperscript{179} Indeed, it has been argued that “if students are financially empowered to choose among a variety of secular and religious schools, the compulsion to protect their individual consciences from the moral or religious content embodied in the curriculum or environment at any particular school dissipates significantly.”\textsuperscript{180} Of course, it hardly needs to be pointed out that children do not make these choices. If parental choice can mean that the compulsion to protect a child’s conscience dissipates, then the safest place for a child’s conscience is the traditional public school.

In the broadest sense, an education that is ideologically or socially reclusive robs children of community. It keeps from

subjects as he desires and can afford.” Meyer v. State, 187 N.W. 100, 104 (Neb. 1922) (Letton, J., dissenting); cf. Berea Coll. v. Kentucky, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) (“The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety.”). While state support of pervasively sectarian schools would violate the Establishment Clause, many church-affiliated charter schools could embrace a common state-mandated curriculum and a diverse student/faculty body without considering their normative religious mission in danger of being undermined. On religious charter schools, see, for example, Preston Green III, Charter Schools and Religious Institutions: A Match Made in Heaven?, 158 WESTLAW EDUC. L. REP. 1 (2001); Benjamin Siracusa Hilton, Note, Is There a Place for Religious Charter Schools!, 118 YALE L.J. 554 (2008).

\textsuperscript{178} Bruce Fuller, The Public Square, Big or Small?: Charters Schools in Political Context, in Inside Charter Schools: The Paradox of Radical Decentralization 14 (Bruce Fuller ed., 2000).


them a common intellectual and cultural capital. Even the children of a separatist religious community are members of many other communities: political, historical, philosophical, artistic. They belong to a past as well as a present; they live, geographically and otherwise, in multiple jurisdictions. A liberal education takes heed of this. It respects the rootedness of children’s lives, teaching children from the inside, in what Warren Nord has nicely called “the communities of memory which tentatively define them.”\textsuperscript{181} A liberal education is inherently conservative, reinforcing cultural continuity. In this sense, a liberal education is inherently liberating, freeing children from cultural discontinuity. A liberal education also respects the self-directedness of children’s lives, teaching children from the outside, from a stance (again, Nord) of “critical distance on the particularities of their respective inheritances.”\textsuperscript{182} These are not incompatible lessons. We reinforce tradition as we come to understand it and even as we come to reinterpret it.

Children who are cut off from an understanding of—or, at least, an introduction to—foreign ideas and values, cultures and traditions, suffer more than an intellectual loss. Understanding what is “other” is an exercise of heart and soul as well as mind; in Eamonn Callan’s phrase, it requires “the enlargement of the imagination,”\textsuperscript{183} the experience “of entering imaginatively into ways of life that are strange, even repugnant, and some developed ability to respond to them with interpretive charity.”\textsuperscript{184} This is why, according to Nord, a liberal education must nurture

\textsuperscript{181} WARREN NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA 202–03 (1995) (“Liberal education has both a conservative and a liberating task: it should provide students a ballast of historical identities and values at the same time that it gives them an understanding of alternatives and provides critical distance on the particularities of their respective inheritances . . . . The essential tension of a liberal education, properly understood, lies in its commitment to initiating students into the communities of memory which tentatively define them, and, at the same time, nurturing critical reflection by initiating them into an ongoing conversation that enables them to understand and appreciate alternative ways of living and thinking.”).

\textsuperscript{182} Id. at 202.

\textsuperscript{183} CALLAN, supra note 90, at 5.

\textsuperscript{184} Id. at 133.
"passions and imagination as well as thinking," why it must nurture the faculties that allow children to get inside alternative ways of life and “to feel the[ir] intellectual and emotional power.” This human and humane sympathy is not an elective subject, an option to be selected after the child has learned basic reasoning skills. As both Nord and Callan (and others) remind us, developing the faculties that allow for sympathetic engagement with “otherness” is a process at the core of teaching children to understand themselves.

[It is only when we can feel the intellectual and emotional power of alternative cultures and traditions that we are justified in rejecting them. If they remain lifeless and uninviting this is most likely because we do not understand them, because we have not gotten inside them so that we can feel their power as their adherents do. Only if we can do this are we in a position to make judgments, to conclude, however tentatively, that some ways of thinking and living are better or worse than others.]

Kept out of a conversation to which their birthright entitles them to join, cloistered children are cut off from themselves, bereft of self-consciousness and awareness of cultural place, and denied the moral freedom to stand or fall. Only through wide and fair exposure to moral and intellectual difference can children “surpass the threshold of ethical servility.”

The Supreme Court has identified autonomy and tolerance as the fundamental values indispensable “in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests . . . .” The prerequisite for both autonomy and tolerance is exposure. To think for themselves, children must know how others think; to take their place as members of a liberal democracy, they must learn to

186. Id. at 201.
187. Id.
188. Reich, supra note 175, at 293. For a multiculturalist defense of exposure to otherness, see Will Kymlicka, Multicultural Citizenship 82–83 (1995); Joseph Raz, The Morality of Freedom 204 (1986); Charles Taylor, 2 Philosophy and the Human Sciences: Philosophical Papers 204–05 (1985).
make room for the places that other members will take. Our constitutional freedoms are predicated on the republican distrust of authoritarian ideologies and a profound skepticism toward final and complete truths.¹⁹⁰ The Supreme Court has said, a bit hyperbolically perhaps, that “[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”¹⁹¹ Constitutionally speaking, we are all students and teachers.

Liberal pluralists concede that some religious groups will create lives that run far counter to cultural norms, separate lives where they can educate their children without exposing them to and engaging them with diverse values and beliefs. For Galston, a liberal society can and should make room for religious separatism: “Autonomy is one possible mode of existence in liberal societies—one among many others; its practice must be respected and safeguarded; but the devotees of autonomy must recognize the need for respectful coexistence with individuals and groups that do not give autonomy pride of place.”¹⁹² Even a proponent of autonomy-facilitation like Harry Brighouse agrees that civic stability does not require everyone to lead autonomous lives, as long as enough people do so “to yield a threshold level of stability.”¹⁹³ But one need not quarrel with the virtue of peaceful coexistence to ask about the fate of children whose families and communities do not give autonomy pride of place. While democracy may survive if it maintains a threshold level of stability, this is no reason to assign some children to a life without free choice.¹⁹⁴

¹⁹⁰. See Barnette, 319 U.S. at 642; see also supra note 29 and accompanying text.


¹⁹³. Brighouse, supra note 154, at 269; cf. WALZER, supra note 192, at 219 (1983) (stating that there is no need for a “frontal assault” on private schools as long as the chief effect is “to provide ideological diversity on the margins of a predominately public system”).

¹⁹⁴. Cf. ARCHARD, supra note 137, at 75–76 (“A pluralistic culture is important not for its own sake but because it is the natural outcome of the
Yet if the classroom really is, as the Supreme Court has said, “peculiarly the marketplace of ideas,”¹⁹⁵ the voices of religious children must be allowed to be heard, too. The school classroom, at every level, should be a forum where students are exposed to a variety of viewpoints, secular and religious. The idea that students benefit from exposure to opposing viewpoints only makes sense if that benefit flows in all directions. To that end, the study of religion should be a regular part of a common curriculum. The state has a compelling interest in teaching children the “fundamental values of habits and manners of civility essential to a democratic society,”¹⁹⁶ but if children are to learn a civility that is more than mere manners, then the state must let them speak for themselves (whether they speak the language of reason or faith) and for their community and culture (whether that background is informed by religious or secular values). The voices of religious children must be allowed to be heard—for the educational benefit of the entire class. The classroom that welcomes appropriate religious expression may also be a less threatening place for some religious parents.¹⁹⁷

Many religious parents are concerned, and rightly so, that school officials sponsor particular religious or political beliefs—not deliberately, perhaps, but by a failure to see their own beliefs as partial viewpoints. Certainly, the principle of exposure can be manipulated for use as a political instrument, a latter-day exercise of autonomous life-choices and, at the same time, the invaluable, indeed indispensable, background against which autonomy is exercised. This point is significant for it means that children must still be reared to be autonomous. If all that mattered was pluralism as such it would suffice that families produced heteronomous adults with very different outlooks on life. What the argument from pluralism shows, however, is that families are to be valued for producing diverse, but also autonomous, adults.¹⁹⁸

¹⁹⁵. Keyishian, 385 U.S. at 603 (internal quotation marks omitted).
¹⁹⁷. See, e.g., GUTMANN, supra note 90, at 122–23 (stating that refusal to permit exemptions from some required practices will drive parents away from public schools); Stephen Macedo, Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?, 105 ETHICS 468, 488 (1995) (observing that school officials may have prudential reasons to accommodate religious parents in order to keep their children in public schools).
version of the child-saving strategies of the nineteenth century. But exposure, if it is genuinely implemented, operates on more intellectually generous principles. First, if autonomy is to be taken seriously, then liberals as well as conservatives, the secular-minded as well as the faithful, must be willing to look critically at their own values and beliefs. The voices of all children need to be heard, with fairness and respect. Compulsory education requirements presuppose “sympathetic and critical engagement with beliefs and ways of life at odds with the culture of the family or religious or ethnic group into which the child is born[;]” they entail the effort to foster respect for difference and a willingness to entertain, if only for the sake of argument, ideas that go against the familial grain. Second, exposure is not a ready means to discount the history and culture that children bring with them to school. Respect for difference does not presuppose the child’s rejection of his primary culture. Just the opposite should be the case: The classroom should be a place where the child’s primary commitments can be strengthened; it should be a place where children can go to be understood as well as to understand others. What compulsory education requirements seek to ensure is that, at a minimum, the child learns that there are important choices to be made, and that no source of authority—parent or teacher—has the right to deny someone the opportunity to make choices that are genuinely free.


200. Cf., e.g., Steven C. Rockefeller, Comment, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 97–98 (Amy Gutmann ed., 1994) (“[A]ny liberal democratic politics committed to the ideals of freedom and equality cannot escape the demand that it create inclusive and sustaining social environments that respect all peoples in their cultural diversity, giving them a feeling of belonging to the larger community.”).
VI. CONCLUSION: THE LIMITS OF RELIGIOUS ADVOCACY

When Susan Murphy was thirteen years old, she began to explore the beliefs of the Hare Krishna religion. She was taught, among other things, that women are inferior to men, that the female form is the form of evil, that women should always consult a man before making any type of decision, and that a woman should take her husband as her spiritual authority. Upon leaving the church, Susan sued the church, alleging that church teachings had caused her emotional distress. Expert psychiatric testimony supported Susan’s claim, and she received a jury award of $210,000.

On appeal, the Massachusetts State Supreme Court vacated the emotional distress judgment. Concluding that tort liability amounted to punishment for religious heterodoxy, the court barred what it considered to be a constitutionally impermissible evaluation of the church’s religious beliefs: “The essence of what occurred in the trial is that the plaintiffs were allowed to suggest to the jury extensively that exposure to the defendant’s religious beliefs was sufficient to cause tortious emotional damage . . . .” No defendant, the court maintained, should be forced to prove “that the substance of its religious beliefs is worthy of respect.” For the Murphy court, the key question was whether Susan’s testimony related to conduct or belief. The court rejected her argument that religious teaching is activity, not belief: “Inherent in the claim that exposure to [defendant’s] religious beliefs causes tortious emotional damage is the notion that the disputed beliefs are fundamentally flawed . . . .” The court suggested that Susan’s age “may lessen the degree of constitutional protection which [the church] has against a claim of an

202. Id. at 346.
203. Id. at 344.
204. Id. at 346.
205. Id. at 342.
206. Id. at 347.
207. Id. at 348.
208. Id. at 347.
intentional tort based on religiously motivated activity.”\(^{209}\) But it would not be enough. According to the court, the nature of Susan’s case would “embroil[] the court in an assessment of the propriety of those beliefs regardless of the age of the plaintiffs.”\(^{210}\) Essentially, the court would not conduct a heresy trial.

In fact, whether the church’s religious beliefs were “fundamentally flawed” was really irrelevant. The right legal question was not whether the female form is truly evil (as the church taught), but whether Susan Murphy could show that the church’s teachings, regardless of their truth or falsity, had caused her tortious injury. To borrow from the law of evidence, the court did not need to decide the truth of the matter asserted.\(^{211}\) In the adjudication of such cases, courts can, and must, restrict their inquiries to objective measures of emotional and psychological harm to children.\(^{212}\)

Adults consent to religious association, but the religious identity of children is determined without their consent or understanding.\(^{213}\) They are made members of religious groups by

\(^{209}\) Id. at 349.

\(^{210}\) Id.

\(^{211}\) See Fed. R. Evid. 801(c).

\(^{212}\) Cf. Kendall v. Kendall, 687 N.E.2d 1228, 1236 (Mass. 1997) (finding that a restriction on the father’s right to share religious belief with his children “does not foster excessive government entanglement because the focus of any judicial inquiry will center on the emotional or physical harm to the children rather than the merit worthiness of the parties’ respective religious teachings”).

\(^{213}\) By freely choosing to unite themselves with the spiritually like-minded, adults submit to be governed by the rules of religious membership. But religious authority may not be imposed on those unwilling to subject themselves to it. See, e.g., Guinn v. Church of, 775 P.2d 766, 781 (Okla. 1989) (“[T]he First Amendment will not shield a church from civil liability for imposing its will, as manifested through a disciplinary scheme, upon an individual who has not consented to undergo ecclesiastical discipline.”). Thus, once a member withdraws consent, see, for example, id., or where a religious entity has used coercive techniques to undermine a member’s capacity to consent, the constitutional shield that safeguards religious freedom against tort liability is appropriately broken, see, for example, Molko v. Holy Spirit Ass’n for the Unification of World Christianity, 762 P.2d 46, 56–63 (Cal. 1988) (reversing summary judgment for church on emotional distress claim where atmosphere of coercive persuasion rendered plaintiffs incapable of deciding not to join church); Wollersheim v. Church of Scientology of Cal., 66 Cal. Rptr. 2d. 1, 7–19 (Cal. Ct. App. 1989) (affirming emotional distress judgment for plaintiff where church conducted religious practices in coercive environment); cf., e.g., Guinn, 775 P.2d
birthright, or ceremonies of induction and initiation, or other rules of religious affiliation. Not possessing the full capacity for individual choice, children are by their very nature captive to the will of others. This vulnerability drives the concern that

at 776 ("No real freedom to choose religion would exist in this land if under the shield of the First Amendment religious institutions could impose their will on the unwilling and claim immunity from secular judicature for their tortious acts.").

214. See, e.g., Bellotti v. Baird, 443 U.S. 622, 635 (1979) ("Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability ....").


Where a listening audience is effectively captive to the will of the speaker, "government regulation of [protected] expression may co-exist with and even implement First Amendment guarantees." Id. On the captive audience doctrine, see Hill v. Colorado, 530 U.S. 703, 716–18 (2000) (upholding statute that prohibited speakers from approaching unwilling listeners outside health care facilities); Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994) (targeted picketing of a hospital or clinic threatens psychological well-being of the patient held "captive" by medical circumstance); Frisby v. Schultz, 487 U.S. 474, 484 (1988) (residential privacy protects the "unwilling listener" from unwanted and intrusive speech); Carey v. Brown, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting) (describing the psychological tensions and pressures that result from targeted residential picketing); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–10 (1975) (noting that restrictions on speech are warranted when the degree of captivity "makes it impractical for the unwilling viewer or auditor to avoid exposure"); Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (noting that riders on city transit system are captive audience); Rowan, 397 U.S. at 738 ("We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. This prohibition operates to impede the flow of even valid ideas, the answer is that one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere.") (citing Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952)); Pollak, 343 U.S. at 468 (Douglas, J., dissenting) (riders on street railway and bus system are captive audience); Kovacs v. Cooper, 336 U.S. 77, 86–87 (1949) ("The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it."") (citing Schneider v. State, 308 U.S.

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public schoolchildren are easy targets for state indoctrination.\(^{216}\)

147, 162 (1939)); Packer Corp. v. Utah, 285 U.S. 105, 110 (1932) (finding that viewers of display advertising on billboards and street car placards have messages thrust upon them “without the exercise of choice or volition on their part”); cf. Campbell v. Cauthron, 623 F.2d 503, 509 (8th Cir. 1980) (finding that religious “witnessing” to prisoners who cannot “escape” the preaching violates Free Exercise Clause). But see Cohen v. California, 403 U.S. 15, 21–22 (1971) (finding that persons confronted with defendant’s jacket bearing the words “FUCK THE DRAFT” could have avoided “further bombardment of their sensibilities simply by averting their eyes”); Collin v. Smith, 578 F.2d 1197, 1207 (7th Cir. 1978) (finding that residents could “simply avoid” Nazi-affiliated protest activities).


Though brainwashing is a controversial theory, some courts have recognized that coercive persuasion in religious settings may vitiate consent. See, e.g., Molko, 762 P.2d at 61 (religious organization can be held liable on a traditional cause of action in fraud for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion); Wollersheim, 66 Cal. Rptr. 2d at 15 (religious practices conducted in a coercive environment do not qualify as voluntary religious practices entitled to constitutional protection); Peterson v. Sorlien, 299 N.W.2d 123, 126 (Minn. 1980) (“Coercive persuasion is fostered through the creation of a controlled environment that heightens the susceptibility of a subject to suggestion and manipulation through sensory deprivation, physiological depletion, cognitive dissonance, peer pressure, and a clear assertion of authority and dominion. The aftermath of indoctrination is a severe impairment of autonomy and the ability to think independently, which induces a subject’s unyielding compliance and the rupture of past connections, affiliations and associations.”). But see Lewis v. Holy Spirit Ass’n, 589 F. Supp. 10, 12 (D. Mass. 1983) (no cognizable action against religious organization on basis of alleged tort of brainwashing and indoctrination); Meroni v. Holy Spirit Ass’n, 506 N.Y.S.2d 174, 177–78 (N.Y. App. Div. 1984) (rejecting claim of brainwashing where methods of indoctrination are commonly used by religious groups).

216. On the threat of state indoctrination in the public schools, see, for example, Arons & Lawrence III, supra note 29; Dent, Jr., supra note 136, at 707
But children are no less captive to private educators—indeed, where cut off from ideas and values contrary to those of the home, they are likely to be more so; and religious mentorship carries with it a form of authority from which children may find it especially difficult to escape.

When courts consider the tort liability of religious mentors, they commonly ask two questions: (1) whether liability would infringe upon belief as opposed to conduct, and (2) whether the conduct was secular or, if the conduct is deemed religious, whether it is a central part of the religious teachings of the defendant (and, thus, prohibition would be a substantial burden on religious freedom). But both questions rest on dubious grounds.

The line between belief and conduct is not as bright as we might think. Laura Schubert discovered how quickly bright lines can lead to confusion when she sued the Pleasant Glade Assembly of God. In Pleasant Glade Assembly of God v. Schubert, Schubert brought a tort claim based on the emotional injuries she suffered when church members, against Laura’s objections, sought to cast demons out of her. Laura was physically restrained as part of a “laying on of hands,” and subsequently she commenced a tort action for assault, battery, and false imprisonment. The Supreme Court of Texas

(1993); Kamenshine, supra note 164; Strossen, supra note 72; Yudof, supra note 164; Moskowitz, supra note 164; cf. MILL, supra note 164, at 117–18 (“A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power . . . whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation in proportion as it is efficient and successful, it establishes a despotism over the mind . . . .”).


220. Id. at 5.

221. Id.
concluded that the adjudication of such claims “would necessarily require an inquiry into the truth or falsity of religious beliefs.”  

In the court’s judgment, “the act of ‘laying hands’ [was] infused in Pleasant Glade’s religious belief system.” The court ignored the irony that this judgment was itself a determination about doctrinal matters. Dissenting from the majority opinion, Chief Justice Jefferson was on more solid ground when he observed “[i]n reaching the conclusion that the act of ‘laying hands’ is infused in Pleasant Glade’s religious belief system, the Court engages in the unconstitutional conduct it purports to avoid: deciding issues of religious doctrine.”

When courts assess what is a substantial burden on religion, they do so despite the Supreme Court’s admonition that it is not the business of the courts to determine what beliefs or practices are central to a religious tradition. But what if litigation itself is a substantial burden? In Schubert’s case, the church did not seek protection from Laura’s secular claims of false imprisonment and assault. To these claims, the church stated, its religious belief and practices were “actually irrelevant.” In its words:

Plaintiff, Laura Schubert, a teenager, does bring a secular complaint against the church and its pastors. It begins when, according to her own pleading, she “collapsed” while standing

222. Id. at 9 (quoting Tilton v. Marshall, 9025 S.W.2d 672, 682 (Tex. 1996)); see also Paul v. Watchtower Bible & Tract Soc’y of N.Y., 819 F.2d 875, 883 (9th Cir. 1987) (“Intangible or emotional harms cannot ordinarily serve as a basis for maintaining a tort cause of action against a church for its practices—or against its members.”).

223. Schubert, 264 S.W.3d at 11.

224. Id. at 18 n.7 (Jefferson, C.J., dissenting) (citation omitted).

225. See Emp’t Div., Dep’t of Human Res. v. Smith, 494 U.S. 872, 887 (1990) (“Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.”); Hernandez v. Comm’r, 490 U.S. 680, 699 (1989) (“It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith . . . .”); see also Smith, 494 U.S. at 887 (“Judging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’” (quoting United States v. Lee, 455 U.S. 252, 263 n.2 (1983) (Stevens, J., concurring))).

at the altar of the church during a church service. She alleges she was physically grasped, taken and held on the floor of the Church against her will. This was allegedly done as part of an “exorcism” in an alleged attempt to exorcise a demon from her. However, this religious context is actually irrelevant. Since Laura Schubert alleges she was held on the floor against her will, she brings claims for assault, battery, and false imprisonment. This is a “bodily injury” claim . . . Relators, the church and the pastors, concede that this is a “secular controversy” and does not come within the protection of the First Amendment. That is, no church or pastor can use the First Amendment as an excuse to cause bodily injury to any person . . .

If this were the sum total of this dispute, Relators [i.e., the church defendants] would not be here before this Court . . . No religious beliefs would be implicated. The First Amendment and the free exercise of religion would simply not be an issue. Therefore, Relators do not request that this Court issue mandamus to stop litigation of this “secular controversy for bodily injury.”

Nonetheless, the court held that the church was constitutionally protected “against claims of intangible harm derived from its religious practice of ‘laying hands.’” The Schubert court decided that a restriction on the “laying hands” practice would be a substantial burden. Even if the tort claim could be decided without regard to religion, the adjudication of the claim—that is to say, the mere fact that the church was subject to tort liability—“would have an unconstitutional ‘chilling effect’ by compelling the church to abandon core principles of its religious beliefs.”

Though Yoder’s harm standard fails to offer children the full measure of protection they need, it does set an outer limit to the right of religious indoctrination. Where indoctrination “impairs a child’s emotional development or sense of self-worth,” the state

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227. *Id.*
228. *Id.* at 8.
229. *Id.* at 11.
230. *Id.* at 10.
231. The definition of “child abuse and neglect” under the federal Child
Parenting Rights

should protect the child by allowing religious mentors to be subject to tort liability. This protection need not come at the cost of constitutional privilege for religious entities. Tort liability is not premised on the judgment that a religious belief is somehow “fundamentally flawed” or not worthy of constitutional protection. To the contrary, whether religious advocacy was meant to and did inflict severe emotional distress is a question that can be adjudicated by the neutral and generally applicable principles of tort law.


232. See supra note 213 and accompanying text.

233. See Smith, 494 U.S. at 879 (“[T]he right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” (quoting Lee, 455 U.S. at 263 n.3 (1982) (Stevens, J., concurring in the judgment)); Presbyterian Church v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church, 393 U.S. 440, 449 (1969) (“Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without ‘establishing’ churches to which property is awarded.”); Jones v. Wolf, 443 U.S. 595, 602 (1979) (“[W]e think the ‘neutral principles of law’ approach is consistent with the foregoing constitutional principles.”); see also, e.g., Smith v. O’Connell, 986 F. Supp. 73, 80 (D.R.I. 1997) (finding that “there is no question that the principles of tort law, at issue, are both neutral and generally applicable”); Doe v. Hartz, 970 F. Supp. 1375, 1431–32 (N.D. Iowa 1997) (holding that the First Amendment does not bar tort claim against church defendants because claim can be assessed applying neutral principles of law); Isely v. Capuchin Province, 880 F. Supp. 1138, 1151 (E.D. Mich. 1995) (finding no constitutional bar to adjudication of tort claim because “neutral’ principles of law can be applied without determining underlying questions of church law and policies” (citing Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976))); Moses v. Diocese of Colorado, 863 P.2d 310, 320–21 (Colo. 1993) (civil suit not barred by First Amendment because deciding claims does “not require interpreting or weighing church doctrine and neutral principles of law can be applied”); Fortin v. Roman Catholic Bishop, 871 A.2d 1208, 1225 (Me. 2005) (“Courts do not inhibit the free exercise of religion by applying neutral principles of law to a civil dispute involving members of the clergy.”); cf. Kendall v. Kendall, 687 N.E.2d 1228, 1233 n.16 (Mass. 1997) (noting that “[t]he GAL’s
It is a powerful and remarkable privilege to control the spiritual consciousness of another. And it is not immune from abuse. Children need to be protected from religious indoctrination that is psychologically injurious, but, more broadly speaking, they need to be safeguarded from mentorship that denies them the ability to make independent choices about religious matters. Religious mentorship should make, so to speak, no permanent marks on the child; in other words, it must not foreclose the child’s prospective religious freedom. To direct, rather than to control, the religious destiny of the child: This is the great and challenging task, the heart (and soul) of the religious mentor’s fiduciary responsibilities.

234 Report was based on interviews with the parents, the children, and the children’s teachers, psychological tests, and observations of the children interacting with both parents); Jared A. Goldstein, Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs, 54 Cath. U. L. Rev. 497, 502–03 (2005) (“Positive religious questions, such as those concerning the content of religious beliefs or the importance of a religious practice within the context of a religion, do not call on courts to employ anything other than ordinary tools of judicial fact-finding and can be resolved through resort to traditional evidence, such as reliance on expert witnesses, treatises, and factual testimony.”); Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 45–46 (1990) (adjudication of emotional distress cases applies neutral rules).

235 Cf. MacLeod, supra note 137, at 130 (“A refined liberal conception [of parental authority] does impose constraints on the strategies that parents may legitimately employ to transmit a conception of the good to children . . . . The general idea is that parents should be permitted to advance a distinctive conception of the good for their children. However, parents must not seek to exempt the ends they wish their children to adopt from rational scrutiny. Nor may parents undertake to foreclose the possibility of deliberation about such matters by tightly insulating children from exposure and access to the social conditions of deliberation.”); David A.J. Richards, The Individual, the Family, and the Constitution: A Jurisprudential Perspective, 55 N.Y.U. L. Rev. 1, 25 (1980) (“Parents may not justly mold their children’s interests to conform with their own interests and values, no matter how profound, if they do so in a way that unfairly deprives the children of developing the capacity to assess these matters by rationally weighing arguments and evidence.”).

235 The Supreme Court has defined the due process right to parent as “the interest of parents in the care, custody, and control of their children.” Troxel v. Granville, 530 U.S. 57, 65 (2000). On the phrase “care, custody, and control,” see Leebaert v. Harrington, 332 F.3d 134, 142 n.3 (2d Cir. 2003):

The Troxel Court appears to be the first to use the phrase “care, custody, and control,” rather than the very similar “care, custody, and management,” Stanley v. Illinois, 405 U.S. 645, 651 (1972), in the
With all its attendant joys, parenting is a somber task for it entails, in a profound and poignant way, the loss of the child. It is the parent who enables the child to make free and independent choices, thus preparing the child to leave behind home and family, thus encouraging (or at least allowing) the child to form his or her own image rather than merely to conform to some parental likeness. If we could, we might shield our children from the responsibilities and sufferings that accompany choice. If we could, we might shield ourselves from the pain that accompanies the child’s individuation and eventual separation from our hands. The law presumes that parents act in the best interests of their children, but, as every parent knows, it is often more difficult for parents to separate themselves from their children, to let go of them, than it is for children to follow the natural path to adulthood.

Most of us do manage to let go. We see every day that our children are on a path that leads to separation and individuation. We encourage that growth, validating the child’s steps (literal and metaphorical) toward independence. But we should not
presume that all parents do so. Deeply dependent on the child, desperately wanting the child to mirror, and thus affirm parental interests and emotions, the narcissistic parent uses any number of emotional tools—often disguised to parent and child alike as acts of love—to frustrate the child’s assertions of selfhood.

Among other students of parenting pathologies, the psychoanalyst Alice Miller has described how the narcissistic parent, ridden with a profound lack of security, disrupts the process by which children become morally, intellectually, and spiritually autonomous. 236 In fact, the narcissistic parent turns this developmental process on its head:

* Healthy parenting serves the needs of the child. One of the most important needs of the child is for mirroring (or echoing). By being a mirror of the child’s emotions and interests, the parent reflects the child’s evolving self-image. The act of mirroring enables the child to gain the trust and confidence that is a prerequisite to both individuation and intimacy. In the natural course of events, children separate themselves from their parents. In the natural course of events, children form new relationships outside the family sphere of interest.

* The narcissistic parent reverses this process. Narcissistic parents use the child as a mirror of their own interests and emotions. The adult creates the child in his or her own image.

236. On parental narcissism, see generally ALICE MILLER, THOU SHALT NOT BE AWARE: SOCIETY’S BETRAYAL OF THE CHILD (1998); LEONARD SHENGOLD, SOUL MURDER: THE EFFECTS OF CHILDHOOD ABUSE AND DEPRIVATION (1989); R.D. LAING, THE DIVIDED SELF: AN EXISTENTIAL STUDY IN SANITY AND MADNESS (Penguin Books 1965) (1959); cf. Ira C. Lupu, The Separation of Powers and the Protection of Children, 61 U. Chi. L. Rev. 1317, 1326 (1994) (“[S]elf-love may be an unusually corrupting force when it comes into play in a parent-child relationship. When a politician or corporate official advances the interests of himself, his class, or his cronies, one would expect that he would at least be aware of the tension between his own interests and those of the commonwealth; cognitive dissonance has its limits. In the parent-child relationship, however, the capacity for self-deception may be at its maximum. Because the parent is socially and psychologically reinforced to view her relationship with the child as one of affectionate personal attachment, the parent may be unusually blind to the possibility that self-love is distorting her judgment. Moreover, one can much more easily justify domination of children, who obviously need some degree of care and guidance, than one can justify comparable (mis)treatment of adults.”).
The problem of individuation does not belong to the child: The problem is that it is difficult for parents to separate themselves from their children.

* Emotional or psychological misconduct occurs when the love of the parent is made conditional on the child’s mirroring of the adult image. The issue is obedience in the broadest sense. It is not just a matter of following the rules, though that is important. It is more a matter of being like the adult, of thinking and acting like the adult. It is a matter of accepting the adult’s set of interests and perspectives. It is even a matter of liking and loving the adult.

* The child has no choice but to accept the images of approval and disapproval it receives from the parent, and to embrace these images as an ego ideal. Conforming to an image needed and desired by the parent, the child represses its own need and desires. The child represses its own will. The price of not doing so is shame and humiliation (the child is willful, the child is bad). The child must accept that the adult is not at fault. If my parent withdraws love from me, I must be bad. The ideal image of the parent must be preserved.

* But the price of repression is that the child must come to see its own needs and desires as bad. The obedient child is thus trapped in a double-bind of self-abnegation.

This type of parental rule takes a terrible emotional toll on the child. The child comes to see its own needs and desires as unworthy and, accordingly, represses its evolving capacity for thinking and feeling independently. To be fully loved, the child has no choice but to conform to, to be obedient to, the parental image. And when parental authoritarianism has the sanction of religious authority, its emotional toll is compounded, its emotional effects more entrapping. It is one thing to disobey and displease a parent, another to disobey and displease God. When God himself demands the child’s self-sacrifice, the child is bound to suffer sorely for simple acts of self-assertion.

If the state as educator demanded submission to its
ideological authority, we would consider that gross misconduct.\footnote{237} But we do not define the same requirement as injurious when required by religious mentors. Quite the opposite: We applaud the obedient child—the child who, like Betty Simmons, embraces filial devotion, unaware of its costs.

And because we do not define the child’s self-sacrifice as injury, we do not see it.

\footnote{237. Cf. Arons & Lawrence III, supra note 29, at 312 (“If the government were to regulate the development of ideas and opinions through, for example, a single television monopoly or through religious rituals for children, freedom of expression would become a meaningless right.”).}